83-1201

No. _____

IN THE

Supreme Court of the United States

October Term, 1983

TODD SHIPYARDS CORPORATION AND
FIREMAN'S FUND INSURANCE CO.,

Petitioners

v.

GERALD L. BLACK AND DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR,

Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. For occupational diseases with long latency periods, when does the "date of injury" occur for purposes of determining a claimant's "average weekly wage" and resultant compensation rate under the Longshoremen's and Harbor Workers' Compensation Act?

2. Under the Last Employer Rule is a maritime employer liable for compensation under the Longshore Act for exposure of claimant to asbestos where claimant is later exposed to asbestos and first manifests a loss of wage-earning capacity from an asbestos-related disease while employed by a subsequent non-maritime employer?

3. Is a maritime employer which has exposed claimant to asbestos liable for more than its proportionate share where claimant was later exposed to asbestos and first manifests a loss of wage-earning capacity from an asbestos-related disease while employed by a subsequent non-maritime employer?

LIST OF PARTIES

The caption contains the names of all parties* to the proceedings below.

* In compliance with Rule 28.1, Petitioner Todd Shipyards Corporation has one affiliate or subsidiary not wholly owned: Montana Valley Land Company. Petitioner Fireman's Fund Insurance Co. is a wholly owned subsidiary of American Express Insurance Services, Inc., which in turn is a wholly owned subsidiary of American Express Company. Non-wholly owned subsidiaries of Fireman's Fund are: Afia Finance Corp.; Atalfa, Inc.; A.B.C. Partners; The National Insurance Company of New Zealand, Limited; San Francisco Reinsurance Company; United Malayan Insurance Company Berhad; United Malayan (International) Limited; Sime-Fireman's Insurance Holdings (PTE) Limited; Reinsurance Management Corporation of Asia (PTE) Limited; RMCA Reinsurance (PTE) Limited; Crusader Insurance Company (South Africa) Limited; Crusader Life Assurance Corporation Limited.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, dated October 4, 1983, is reported at 717 F.2d 1280, and is set forth in Appendix A, *infra*. An earlier opinion of the United States Court of Appeals for the Ninth Circuit, dated May 23, 1983, was originally reported at 706 F.2d 1512, but because that opinion was withdrawn, it is not set forth in the

Appendices. However, the Order of the United States Court of Appeals for the Ninth Circuit, filed October 4, 1983, withdrawing the court's initial opinion, while not reported, is set forth in Appendix B, *infra*. The Order of the United States Court of Appeals for the Ninth Circuit, filed October 20, 1983, denying the Petition for Rehearing, is not reported, but is set forth in Appendix C, *infra*.

The Decision and Order of Administrative Law Judge Joseph A. Matera, dated October 17, 1979, is reported at 11 BRBS 60(ALJ), and is set forth in Appendix D, *infra*. The Decision of the Benefits Review Board, dated June 12, 1981, is reported at 13 BRBS 682, and is set forth in Appendix E, *infra*. An important companion case, *Dunn v. Todd Shipyards Corp.*, 13 BRBS 647 (BRB 1981), is set forth in Appendix F, *infra*.

JURISDICTION

On October 4, 1983, the Court of Appeals decided and entered its Decision affirming the decisons of the Benefits Review Board and Administrative Law Judge. A petition for rehearing was timely filed October 18, 1983, and was denied by Order dated October 20, 1983. Jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves interpretation of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq*. The relevant sections are voluminous and are set forth in Appendix G, *infra*. The sections set forth in Appendix G are:

33 U.S.C. § 902(2) - definition of "injury"

33 U.S.C. § 902(3) - definition of "employee"

33 U.S.C. § 902(4) - definition of "employer"

33 U.S.C. § 902(10) - definition of "disability"

33 U.S.C. § 902(13) - definition of "wages"

33 U.S.C. § 903(a) - coverage of Act

33 U.S.C. § 910(a)-(d) - determination of average weekly wage

33 U.S.C. § 910(h) - adjustment of certain pre-1972 benefit levels

33 U.S.C. § 912(a) - notice of injury

33 U.S.C. § 913(a) - filing of claim

STATEMENT OF THE CASE

Gerald Black, the claimant[1], was employed as a welder by Todd Shipyards between 1942 and 1945. For approximately half of that time he was exposed to asbestos. It was stipulated that his average weekly wage during his last year of employment at Todd was $92.00. From 1951 to May, 1977, Black worked as a welder for Boeing Aircraft Co. where he was further periodically exposed to asbestos from asbestos gloves and asbestos curtains. His average weekly wage during his last year at Boeing was stipulated to be $293.86.

For some time before he terminated employment at Boeing on May 19, 1977, Black experienced coughing up blood and nosebleeds. On May 27, 1977, he underwent surgery for squamous cell carcinoma and the right upper lobe of his lung was removed. On December 19, 1977, Black was informed by his doctor that he was suffering from an occupational disease arising out of his prior employment. In March, 1978, Black initiated this claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* ("Act"), against Todd and its insurance carrier from 1942 to 1945, Fireman's Fund.

Formal hearing was held on August 15, 1979, before Administrative Law Judge Joseph A. Matera, resulting in a Decision and Order, dated October 17, 1979 (Appendix D). The ALJ found that Black's asbestos exposure together with his 40-year smoking history had had a co-carcinogenic effect causing Black's lung cancer (Appendix D-7-8). He further found that "asbestos

[1]Black died on April 2, 1981, during the appeal of this claim. His widow, Zella Black, became claimant for survivor's benefits under 33 U.S.C. § 909.

exposure to any degree can be harmful" (Appendix D-4) and that while Black's exposure to asbestos at Todd had resulted in "pathological lung changes" (Appendix D-7), Black also "was subjected to injurious asbestos stimuli during his employment by Boeing Aircraft Company" (Appendix D-4). Thus, while readily acknowledging that Black's last injurious exposure to asbestos occurred, not at Todd, but during his subsequent 26 years' employment at Boeing, the ALJ refused to exonerate Todd from liability under the "Last Employer Rule." Instead, the ALJ, after concluding that Boeing was not a "maritime employer" subject to the Act, assessed full liability against Todd, holding that the "Last Employer Rule" applies only among "statutory employers" subject to the Act (Appendix D-12). Moreover, holding that Black did not suffer an "injury" for purposes of 33 U.S.C. § 910 until December, 1977, when Black's disease was diagnosed as industrially related, the ALJ found Todd liable for compensation based on an average weekly wage of $293.86, which Black had earned during his last year at Boeing. The ALJ rejected Black's $92.00 average weekly wage while employed at Todd. (Appendix D-13).

Todd and Fireman's Fund thereafter appealed to the Benefits Review Board contending that the ALJ misapplied the Last Employer Rule, or, in the alternative, that he should have apportioned liability between Todd and Boeing with Todd responsible only for its apportioned share. Todd and Fireman's Fund also contended the ALJ erroneously used Black's average weekly wage while employed at Boeing as the basis of computing the compensation rate by basing Black's date of injury on the date his industrial disease was diagnosed rather than the last date Black was exposed to injurious stimuli while employed by Todd. In a fractured *Per Curiam* decision supported by three separate opinions dated June 12, 1981 (Appendix E), the BRB affirmed the Decision of the ALJ. Judges Miller and Kalaris agreed that Todd, as the last *covered* employer under the Act, was liable for benefits to Black. They could not, however, agree on the method of calculating benefits.[2] Chief Judge Smith would have exoner-

[2]Judge Miller would have remanded the case to the ALJ to determine Black's average weekly wage based on a date of "injury" defined as the date Black's occupational disease manifested itself through a loss of wage-earning

ated Todd from all liability under the Last Employer Rule, and accordingly, he did not reach the date of injury issue and the calculation of benefits question related thereto. (Appendix E-4-5, 11 *et seq.*). Thus, evenly divided on the date of injury/computation of benefits issue, the ALJ decision was affirmed.[3]

Finally, Todd and Fireman's Fund petitioned to the Court of Appeals for the same relief sought from the BRB. An initial decision of the Ninth Circuit Court of Appeals, issued May 23, 1983, was subsequently withdrawn by Order dated October 4, 1983. (Appendix B). A new opinion issued by the Ninth Circuit on October 4, 1983 (Appendix A) affirmed the ALJ and the Board majority in finding Todd wholly liable for Black's occupational disease though caused in part by a subsequent employer, Boeing, who was not subject to the Act. (Appendix A-53). The Court of Appeals further held that the date of injury for purposes of calculating benefits under the Act, is the date an occupational disease manifests itself through a loss of wage-earning capacity. (Appendix A-44,52).

REASONS FOR GRANTING THE WRIT

The writ of certiorari should be granted because the Court of Appeals has: (1) decided a federal question in a way in conflict with another circuit and applicable decisions of this Court, and (2) decided an important question of federal law which should be settled by this Court.

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capacity. (Appendix E-10-11). Judge Kalaris would have modified the ALJ decision to reflect an average weekly wage of $92.00 based upon Black's last year of employment at Todd, in reliance upon companion decisions decided by the BRB on the same day as the case *sub judice*, *Dunn v. Todd Shipyards Corp.*, 13 BRBS 647 (BRB 1981), and *Verderane v. Jacksonville Shipyards, Inc.*, 14 BRBS 220 (BRB 1981). (Appendix E-9-10).

[3]Judge Smith joined Judge Kalaris in the majority in both *Dunn* and *Verderane, supra*, and therefore it seems clear that the ALJ's determination of the date of injury/computation of benefits issue would have been modified in accordance with these decisions, had Judge Smith chosen to reach that issue.

THE NINTH CIRCUIT INCORRECTLY DEFINED TIME OF INJURY FOR PURPOSES OF DETERMINING AVERAGE WEEKLY WAGE IN OCCUPATIONAL DISEASE CASES

1. The Ninth Circuit's equation of injury with disability is in conflict with applicable decisions of this Court.

The Court of Appeals held that for purposes of determining the proper average weekly wage in occupational disease cases, the time of injury under 33 U.S.C. §910 is "the date when the occupational disease manifests itself through a loss of wage-earning capacity." (Appendix A-44). Under the Act loss of wage-earning capacity is "disability." 33 U.S.C. §902(10). The Court of Appeals' holding that time of injury is manifestation of the disease through a loss of wage-earning capacity, in effect, equates "injury" with "disability." This holding cannot be reconciled with this Court's decisions in *Pillsbury v. United Engineering Co.*, 342 U.S. 197, 72 S. Ct. 223 (1952), and *U. S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 102 S. Ct. 1312 (1982), neither of which were cited by the Court of Appeals.

In *United Engineering*, this Court expressly rejected equating the terms "injury" and disability" under the Act. In affirming the lower court's dismissal of the claims as time-barred under 33 U.S.. §913(a), this Court distinguished "injury" from "disability" as used in the statute:

> We are not free, under the guise of construction, to amend the statute by inserting therein before the word "injury" the word "compensable" so as to make "injury" read as if it were "disability." Congress knew the difference between "disability" and "injury" and used the words advisedly. . . . Furthermore, Congress defined both "disability" and "injury" in the Act, and its awareness of the difference is apparent throughout. . . . Congress meant what it said when it limited recovery to one year from date of injury, and "injury" does not mean "disability."

342 U.S. at 199-200, 72 S. Ct. at 224-225 (Footnote omitted). Although the Court specifically stated that it was not dealing with a latent injury or an occupational disease in noting that each claimant was immediately aware of his injury, the Court's discussion of the distinction between the two terms would apply equally in occupational disease cases. Therefore, the Ninth Circuit's equation of injury with disability is clearly contrary to law.

The Court of Appeals' adoption of the date of manifestation rather than the date of exposure to harmful stimuli to define time of injury is also inconsistent with the Court's reasoning in *U. S. Industries, supra*, and the plain language of the Act. 33 U.S.C. §902(2) and §903(a). The Court emphasized under the language of the statute, an "accidental injury" must both arise "out of" and "in the course of" employment. The former refers to injury causation, and the latter to the time, place and circumstances of the injury. 102 S. Ct. at 1317-1318. Although this Court was not there dealing with an occupational disease, it distinguished between an injury and the later manifestation of that injury. 102 S. Ct. at 1317-1318.

Although 33 U.S.C. §902(2) only requires that an occupational disease arise naturally out of employment, 33 U.S.C. §903(a) makes clear that there is coverage under the Act "*only* if disability or death results from an *injury occurring upon the navigable waters* . . ." (empahsis added). The Court of Appeals' definition of injury in terms of manifestation of the disease rather than in terms of injurious exposure is clearly contrary to the plain language of the Act. The court's holding that "injury" is "exposure" for jurisdictional purposes under 33 U.S.C. §903(a) cannot be reconciled with its use of "injury" as "manifestation" for average weekly wage determination under 33 U.S.C. §910.[4] As the Court has noted in *Morrison-Knudsen Construction Co. v. Director, OWCP*, ___ U.S. ___, *103 S. Ct. 2045, 2051 (1983)*, a word is presumed to have the same meaning in all subsections of the statute.

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[4] The court below recognized that 33 U.S.C. §903(a) is jurisdictional and requires an "injury occurring upon navigable waters." It then concluded "Black was *exposed* to the dangerous asbestos while being employed by Todd upon navigable waters and is *thus covered* by the Act." (Appendix A-12) (emphasis added).

2. This Court has rejected reliance on "recent trends" to expand the Act.

The Court of Appeals finds support for its holding by relying on the "trend of judicial opinion," noting "the *trend* is clearly toward the application of the time of manifestation rule." (Appendix A-40) (emphasis added). This Court in *Morrison-Knudsen*, 103 S. Ct. at 2052, stated " . . . a comprehensive statute such as this [Longshore] Act is *not* to be judicially expanded because of *recent trends*." (Emphasis added).[5] See, also, *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 279-280, 283-284, 101 S. Ct. 509, 515, 517 (1980).

None of the cases relied on by the Court of Appeals deal with the issue of compensation but rather deal with insurers' liability under asbestos manufacturers' policies or statutes of limitations in which the policy considerations involved have no bearing on this case.[6] The lower court's reliance on *Urie v. Thompson*, 337 U.S. 163, 69 S. Ct. 1018 (1949), also a statute of limitations case under the Federal Employers' Liability Act, is equally inapplicable.[7] Many cases have adopted a discovery rule for statute of limitations purposes, as this Court did in *Urie*, on

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[5]Although the Court of Appeals by footnote considered *Morrison-Knudsen*, it is clear the court nevertheless relied heavily on the "trend of judicial opinion" to support the time of manifestation approach adopted. (Appendix A-54). The "trend" noted by the Ninth Circuit could be more aptly characterized as a state of judicial flux. The Fifth and Sixth Circuits, in interpreting insurance coverage in the context of asbestos-related disease cases, have rejected the manifestation theory and adopted date of exposure to define date of injury. See *Porter v. American Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981), *cert. denied*, 454 U.S. 1109 (1981); *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *modified on reh'g*, 657 F.2d 814 (6th Cir. 1981), *cert. denied*, 454 U.S. 1109 (1981).

[6]See, *Keene Corp. v. Insurance Co. of North America*, 667 F.2d 1034, 1043, n. 17 (D.C.Cir. 1981)*cert. denied*, 455 U.S. 1007 (1982), and *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*, *supra*, 633 F.2d at 1220, in which the courts distinguish statute of limitation cases and note the special need for tolling statute of limitation provisions.

[7]*Urie's* reference to a California case equating "injury" with manifestation was relevant only to the statute of limitations issue there before this Court. Indeed, not only was compensation not an issue, but *Urie* is also factually distinguishable in that the date of last exposure, date of disability and date of diagnosis were all substantially contemporaneous.

the theory that a claimant should not be held responsible for filing a claim before becoming aware of the injury. This problem under the Longshore Act was addressed by Congress in 1972 when 33 U.S.C. §§912(a) and 913(a) were amended to toll the time for giving notice and filing a claim until the claimant is aware, or should be aware, of the relationship between the injury and the employment.[8] If the lower court were correct that "injury" means date of manifestation in an occupational disease context, the amendment of these sections would have been meaningless. Congress should not be presumed to have enacted meaningless legislation.

3. *The conflict between the Court of Appeals' decision and the Benefits Review Board's decision in* Dunn *should be resolved.*

In companion cases decided along with *Black*, the BRB held that in occupational disease cases the "date of injury" for purposes of 33 U.S.C. §910 is the date of last harmful exposure. *Dunn v. Todd Shipyards Corp., supra.* (Appendix F), during employment with the last covered employer. *Verderane v. Jacksonville Shipyards, Inc., supra. Dunn*, though criticized by the Ninth Circuit, remains binding on administrative law judges deciding claims, at least outside the Ninth Circuit. This conflict between the Ninth Circuit and the Board's ruling, should be promptly resolved in the interest of uniformity.

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[8]Representative Dominick Daniels of New Jersey, the sponsor of H. R. 12006 amending the Act in 1972, stated:

> The thought I had in mind in incorporating this particular provision in my bill was the fact that sometimes a person does not become aware of the fact that he has suffered an injury resulting from his occupation until considerable time has passed.
>
> • • •
>
> More recently the Congress has provided for compensation for pneumoconiosis under the coal miners health and safety law. That was developed in this committee. Then, of course, in other industries, too, you have asbestosis and other similar injuries arising in the textile industry, which are not discovered for many years after exposure.

Hearings on H.R. 247, H.R. 3505, H.R. 12006, H.R. 15023 Before The Select Subcommittee on Labor of the House Committee on Education and Labor. 92d Cong., 2d Sess., at 112-113 (1972).

4. The legislative history of the Act is in conflict with the lower court's decision.

In reaching its decision, the Ninth Circuit omitted any meaningful review of the legislative history of the Act. The history shows that Congress did not intend that "injury" be synonymous with "disablement." Likewise, in contrast to treatment of federal employees under the Federal Employees' Compensation Act, Congress has restricted wage determinations to the date of injury rather than date of disability.

In both the Senate and House versions of the original bills which gave rise to the Longshore Act, the critical word "injury" was defined to include "[a] disease arising out of employment, and disablement from such disease shall be treated as the happening of an accident."[9] In the very same section of the bills, "wages" were defined as "the money rate at which the service rendered is recompensed . . . at the time of the accident." *Id.* In both bills, the average weekly wage was the critical basis upon which compensation payments were determined. 1926 Sen. Hearings at 3, 4; 1926 House Hearings at 4, 5. Thus, these initial bills equated "disablement" with "accident," and the date of the "accident" was the date on which average weekly wage was to be determined.[10]

Congress, however, in 1927, expressly rejected this proposed crucial language and radically altered the bills before it. The actual language passed provides that average weekly wages are determined as of the time of "injury," and not "accident" or "disablement." 33 U.S.C. §910. It was plainly apparent throughout the committee hearings that Congress was mindful of the problems associated with the latency periods associated with

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[9] *Compensation for Employees in Certain Maritime Employments: Hearings Before a Subcomm. of the Sen. Judiciary Comm. on S.3170, 69th Cong., 1st Sess.* [hereinafter "1926 Sen. Hearings"] 1-2 (1926); *To Provide Compensation for Employees Injured and Dependents of Employees Killed in Certain Maritime Employments: Hearings Before the House Judiciary Comm. on H.R. 9498, 69th Cong., 1st Sess.* [hereinafter "1926 House Hearings"] 1-2 (1926).

[10] The language of these initial bills were virtually identical with that contained in the New York Workmen's Compensation Statute, now codified as N.Y. Work. Comp. Law §38 (McKinney). The New York courts have analyzed the statutory language precisely as outlined above. *Graham v. Walsh Construction Co.*, 30 A.D.2d 996, 296 N.Y.S.2d 31, *leave to appeal denied*, 23 N.Y.2d 643 (1968).

occupational diseases. See, e.g., 1926 Sen. Hearings at 73-75; 1976 House Hearings at 154-156.

Thereafter, Congress made no pertinent changes in the Act affecting occupational diseases until 1972, at which time 33 U.S.C. §§912(a) and 913(a) were amended to toll the notice and claim filing requirement until awareness of the injury. While those changes were intended to accommodate occupational disease latency periods (see footnote *8, supra*), the change in no way affected the determinative date of average weekly wage computation.

By contrast, twelve years prior to the 1972 amendments, Congress chose to change the Federal Employees Compensation Act (FECA), the counterpart of the Longshore Act for federal employees. Many terms under the acts are substantially identical; the term "monthly pay" in FECA is the equivalent of "average weekly wage" under the Longshore Act, and compensation thereunder is computed in a virtually identical fashion. Cf. 5 U.S.C. §§8101(4) and 8114 with 33 U.S.C. §§902(13) and 910(a)-(d).

Prior to 1960, wages under FECA were determined as of the "injury," as in the Longshore Act. In 1960, Congress chose to amend the notice and claim filing provision of FECA to allow for latent disabilities as in occupational diseases. 5 U.S.C. §8122(b). This FECA notice and claim filing provision, as amended in 1960, is now nearly identical in effect to the awareness rule of §§912(a) and 913(a) of the Longshore Act as amended in 1972.

As to FECA, however, Congress went further than merely changing the notice and claim filing provision. Congress was aware that the amendment to that provision did not *ipso facto* alter the determinative date of computation of monthly pay and, therefore, it amended the "monthly pay" provision from the former language, which read:

> The term "monthly pay" shall be taken to refer to the monthly pay at the time of the injury. . . .

5 U.S.C. §790(f) (amended subsequently by Act of Sept. 13, 1960, P.L. 86-767, §208, 74 Stat. 908), to the present version:

> "Monthly pay" means the monthly pay at the time of the injury or the monthly pay at the time disability begins or the monthly pay at the time compensable disability recurs, whichever is greater. . . .

5 U.S.C. §8101(4) (as amended by Act of Sept. 13, 1960, *supra*, recodified from 5 U.S.C. §790(f) by Act of Sept. 6, 1966, P.L. 89-554, §1, 80 Stat. 532). Compensation under FECA may thus be determined at any of three discrete points in time: the time of injury, the time disability occurs, or the time disability recurs. By contrast, Congress has not changed the Longshore Act counterpart language, 33 U.S.C. §902(13), to allow alternatives to the date of injury for purposes of wage determination.

This Court in *Morrison-Knudsen, supra*, recognized the comparative significance of similar federal legislation in addressing the definition of wages under §902(13) of the Longshore Act. There the Court pointed out that when Congress has changed one statutory scheme while leaving another analogous scheme untouched, that fact should be conclusive that Congress intended no change in the latter. 103 S. Ct. at 2056.

5. The definition of time of injury is an important question of federal law that should be decided by this Court.

Given the thousands of pending claims throughout the country from exposure to asbestos that will turn on the outcome of this issue and the major national impact the erroneous decision below will have on claimants, employers and insurance carriers, the definition of time of injury in asbestos-related disease cases under 33 U.S.C. §910 is a vital question that should be decided by this Court.

The lower court's decision embodies an erroneous underlying theme: that Congress intended to favor employees at the risk of uninsurability and fortuitous future economic events visited upon employers.[11] To the contrary, this Court recently stated

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[11] The lower court concluded that the "innocent disabled worker" cannot be burdened with "an employer's inadequate insurance coverage" (Appendix A-47,48), nor with "unanticipated liability" due to the "failure of employers and insurers to predict future costs accurately" (Appendix A-51). The court

that the Act "represents a compromise between the competing interests of disabled laborers and their employers." *Potomac Electric Co., supra*, 449 U.S. at 282, 101 S. Ct. at 516. Citing *Potomac Electric*, this Court stated in *Morrison-Knudsen, supra*:

> There we recognized that the Act was not a simple remedial statute intended for the benefit of the workers. Rather, *it was designed to strike a balance between the concerns of the longshoremen and harborworkers on the one hand, and their employers on the other.* Employers relinquished their defenses to tort actions in exchange for limited and predictable liability. . . .
>
> Against this background, reinterpretation of the term "wages" would significantly alter the balance achieved by Congress. . . . *[E]mployers have long calculated their compensation costs on the basis of their cash payroll.* . . . This shift in the relative value of take-home pay versus fringe benefits *dramatically alters the cost factors upon which employers and their insurers have relied in ordering their affairs. If these reasonable expectations are to be altered, that is a task for Congress.*

103 S. Ct. at 2052 (emphasis added).

These "cost factors" and "reasonable expectations" will be dramatically altered by the lower court's decision. No longer

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further concluded the Act does not permit a "balancing" of burdens: "Indeed, the *Dunn* majority is unable to cite any evidence of a congressional intent that the LHWCA should balance the cost of unanticipated liability to insurers and employers against the harm to injured workers." (Appendix A-51).

33 U.S.C. §910(h) was designed to ameliorate the effects of pre-1972 wages and compensation rates for pre-amendment injuries without imposing an additional burden on the individual employer and carrier. Although the Ninth Circuit stated that there was no evidence that 33 U.S.C. §910(h) was intended to deal with injuries manifesting themselves after 1972 (Appendix A-37-38, n. 11), the Board has held that 33 U.S.C. §910(h) applies to cases such as this where pre-amendment injuries manifest themselves subsequent to the 1972 amendments. *Dunn*, 13 BRBS at 664-665, *Verderane*, 14 BRBS at 225, *Hernandez v. Base Billeting Fund, Laughlin Air Force Base*, 13 BRBS 214 (BRB 1980), *modified on recon.*, 13 BRBS 220 (BRB 1981), *Silberstein v. Service Printing Co., Inc.*, 2 BRBS 143 (BRB 1975).

may maritime employers reasonably expect their compensation liability to be based on their employment and the wages they pay. No longer can insurers base premiums on their insureds' current payrolls. The risk becomes uninsurable because it becomes unpredictable. The nexus among the "employer," the "injury," and the "wages," an essential—indeed,mandatory—ingredient in the structure of the Act, will be destroyed.

THE LAST EMPLOYER RULE ABSOLVES TODD OF LIABILITY

The threshold issue in this case involves the application of the "Last Employer Rule" enunciated in *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137, 145 (2nd Cir. 1955), *cert. den. sub nom. Ira S. Bushey & Sons, Inc. v. Cardillo*, 350 U.S. 913, 76 S. Ct. 196 (1955):

> Congress intended that the employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award.

None of the decisions below have questioned the fact that Black was last exposed to asbestos over the course of nearly 26 years of employment with Boeing prior to his awareness of his disease and its industrial relationship. Nevertheless, the decisions, in holding Todd, rather than Boeing, fully liable, have read into the *Travelers Ins. Co. v. Cardillo* rule that which is not there such that the "rule" may be renamed "the Last *Covered* Employer Rule."

The court below correctly noted that "the Act compensates for occupational injuries that aggravate, accelerate or combine with a *prior* disease or infirmity [and t]he relative contributions of the accident and the *prior* disease are not weighed." (Appendix A-23) (emphasis supplied). Petitioners have no quarrel with the rule that an employer takes its employees as it finds them, subject to all of their *pre-existing* disabilities and conditions, and

that no apportionment among *prior* employers which may be responsible for such conditions is permitted. But the rule now announced by the courts below makes a maritime employer subject to the Act exclusively liable for all of its ex-employees' *subsequent* disabilities and conditions as well, ignoring the causal connection between those subsequent conditions and the subsequent employment. Thus, the courts below would have maritime employers become absolute insurers of subsequent, non-maritime employers, where the allegedly adverse circumstances of their respective employments are similar.

The Last Employer Rule set forth in *Travelers Ins. Co. v. Cardillo, supra*, prohibits the last employer from apportioning liability among prior contributing employers, but not unfairly so. The rule impairs neither the last employer's *choice* in hiring an employee with a prior history of exposure to injurious stimuli, nor the last employer's *control* over the circumstances of that employee's job assignments. Of far different effect is the rule announced below which holds the last covered *maritime* employer fully responsible for its ex-employees' employment and working conditions with subsequent employers as to which the maritime employer has no right of choice or control.

To justify its formulation of the new "Last *Covered* Employer Rule," the Ninth Circuit restated the basis of the traditional rule set forth in *Travelers Insurance Co. v. Cardillo, supra*, as follows:

> [A]dministrative covenience made the last employer doctrine legally acceptable. The underlying rationale is that all employers will be the last employer a proportionate share of the time.

Cordero v. Triple A Machine Shop, 580 F.2d 1331, 1336 (9th Cir. 1978) *cert. denied*, 440 U.S. 911 (1979). In its opinion below, the court, citing its earlier decision in *Cordero, supra*, noted that the traditional "rule apportions liability in a fundamentally equitable manner because 'all employers will be the last employer a proportionate share of the time.'" (Appendix A-14). Petitioners have no quarrel with this method of apportionment, for over the long run it treats all employers fairly. Regrettably, however, with its newly-formulated "Last *Covered* Employer Rule" the court

below has destroyed the fundamental precept of equitable apportionment upon which the *Travelers Insurance Co. v. Cardillo* rule was founded, for now all non-maritime employers are insulated from liability at the expense of maritime employers. Now, non-maritime employers, as non-members of the risk-sharing pool, are invited to contribute with impunity to the exposure of ex-maritime employees to injurious stimuli knowing they will *never* become the last responsible employer, and knowing that the last "covered" maritime employer will assume their liability as well, under the Longshore Act.

Moreover, the court below has provided no justification for its conclusion that "Congress did not intend that a company covered by the LHWCA should escape its legal responsibilities because a subsequent employer not covered by the Act also contributed to the occupational disease." (Appendix A-14-15). Indeed, this conclusion begs the question, for what Congress intended the maritime employer's "legal responsibility" to be under such circumstances is precisely the issue.

Congress intended the subsequent, non-maritime employer to assume full responsibility under circumstances such as those present in this case. Indeed, Congress only begrudgingly enacted the Longshore Act in 1927 after its two previous attempts to require maritime employees to defer to state compensation schemes for their wholly maritime injuries failed.[12] As originally enacted in 1927, until amended in 1972, the "coverage" provision of the Act, 33 U.S.C. §903(a), extended Longshore Act compensation to injuries occurring upon navigable waters "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." Under such circumstances, given the implied Congressional mandate for the "Last Employer Rule" as noted in *Travelers Insurance Co. v. Cardillo, supra*, it seems more logical that Congress intended the last responsible employer to indeed be a

[12]See, Act of Oct. 6, 1917, Ch. 97, 40 Stat. 395, an amendment to the "Savings Clause," struck down in *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920), and Act of June 10, 1922, Ch. 216, 42 Stat. 634, an amendment of the Judiciary Act, struck down in *Washington v. W. C. Dawson & Co.*, 264 U.S. 219 (1924). See, also, *Crowell v. Benson*, 285 U.S. 22 (1932), for an early account of the Act's historical development.

non-maritime employer covered by a state scheme. Such a result would surely foster, rather than destroy, the espoused goal of administrative convenience underlying the "Last Employer Rule," as noted in *Travelers Insurance Co. v. Cardillo, supra*, and would accommodate precedent and uniformity, both of which are valuable and worthy goals in and of themselves.

Finally, the court below placed ill-founded support in *Fulks v. Avondale Shipyards, Inc.*, 10 BRBS 340 (BRB 1979), *aff'd*, 637 F.2d 1008 (5th Cir. 1981), *cert. denied*, 454 U.S. 1080 (1981). There, Avondale employed Fulks in a variety of job tasks, some of which were covered under the Longshore Act and some under the state compensation scheme with Avondale, the single employer, concurrently bound by both statutes. In refusing to absolve Avondale under the *Travelers Insurance Co. v. Cardillo* rule merely because Fulks' last injurious exposure occurred in the performance of a job assignment covered by the state scheme, where it was also found Fulks had been exposed on prior Avondale assignments covered by the Longshore Act, the BRB emphasized that Avondale was "concurrently within the state's jurisdiction," 10 BRBS at 345, that Avondale was indeed "the last employer for whom claimant worked," *id.*, and concluded: "Were we to accept employer's argument, any employer could simply shift an employee to a non-covered employment after years of injurious exposure, and frustrate the purposes of the Act." *Id.*

Contrary to *Fulks, supra*, we are here dealing with *successive* employers, not a single employer subject to *concurrent* coverages. Cf. *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980). Todd was not concurrently within state coverage for Boeing's exposure. Boeing, not Todd, was Black's last employer, both chronologically and with regard to exposure to injurious stimuli. Moreover, Todd, being totally unrelated to Boeing, had neither the requisite choice nor control over Black's job assignments at Boeing to be branded with the Machiavellian incentives of concern to the court in *Fulks, supra*.

The "Last Employer Rule" is jurisdictional in effect. It should have been followed, rather than abrogated, in the present case. The judgment below in this regard should be reversed.

TODD SHOULD NOT BE LIABLE FOR MORE THAN ITS PROPORTIONATE SHARE UNDER THE ACT

If Todd must bear some liability under the Act to Black for his occupational disease despite the "Last Employer Rule," the courts below erred in not apportioning liability between Todd and Boeing, with Todd liable only for its proportionate share, regardless of whether Boeing was subject to the jurisdiction of the Act. Relying on its previous decision in *Cordero, supra*, and on *Travelers Insurance Co. v. Cardillo, supra*, the court below concluded that the "Last Employer Rule" prohibited apportionment. (Appendix A-20). As already noted, however, the court ignored its earlier conclusion that the "Last Employer Rule" is itself a rule of equitable apportionment because "all employers will be the last employer a proportionate share of the time." (Appendix A-14). As indicated, because the new rule formulated by the court has destroyed the traditional rule, so too has it destroyed the underpinnings of the traditional rule, for under the new rule, non-maritime employers will *not* be the last employer a proportionate share of the time.

If apportionment is not to be carried out in the manner embodied in the "Last Employer Rule" itself, to avoid unfairness to Todd in the present case, and to maritime employers in general, some other means must necessarily be found to protect maritime employers from the liability which the court below has imposed for the adverse working conditions of *subsequent* non-maritime employers. This court has recently reiterated on several occasions that it is *not* the sole purpose of the Act "to provide disabled workers with a complete remedy for their industrial injuries," *Potomac Electric Power Co. v. Director, OWCP, supra.*, 449 U.S. at 281; rather, the Act "was designed to strike a balance between the concerns of the longshoremen and harbor workers on the one hand and their employers on the other." *Morrison-Knudsen Construction Co. v. Director, OWCP, supra.*, 103 S.Ct. at 2052. Contrary to the opinion below, the D.C. Circuit, interpreting the Longshore Act over 20 years ago, apportioned liability equally between two successive employers for death by heart attack, stating:

> While there is likewise no such express provision [authorizing apportionment] in our statute there is

> also no provision inconsistent with authority in the Deputy Commissioner to apportion liability between employers where the death is factually found to have been caused equally by separate injuries occurring during separate and successive employments. This seems a fair and valid means of carrying out the terms of the statute consistently with its purpose.

United Painters and Decorators v. Britton, 301 F.2d 560, 562 (D.C.Cir. 1962).

At a minimum, therefore, liability for Black's exposure at Boeing, over which Todd had no right of choice or control, should be apportioned out of the award against Todd leaving Black to recover against Boeing at least for that proportion of his disability.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TODD SHIPYARDS CORP., AND FIREMAN'S FUND INSURANCE CO.,	)	
Petitioners,	)	NO. 81-7494
vs.	)	
GERALD L. BLACK, AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,	)	OPINION
Respondents.	)	

Petition to Review a Decision of the Benefits Review Board Under the Longshoremen's and Harbor Workers' Compensation Act

Argued and Submitted
September 8, 1982

Decided October 4, 1983

Before: BROWNING, TUTTLE,* and REINHARDT, Circuit Judges

REINHARDT, Circuit Judge:

*Honorable Elbert Parr Tuttle, Senior Circuit Judge, United States Court of Appeals for the Eleventh Circuit, sitting by designation.

This case is before us on an employer's petition to review a decision of the Benefits Review Board under the Longshoremen's and Harbor Workers' Compensation Act. The employer disclaims liability for the employee's occupational disease because the employee was also exposed to harmful stimuli while working for a subsequent employer not covered by the Longshoremen's Act. The employer also argues that, at the least, the damages should be apportioned. In any event, the employer contends that, under the time of injury rule, any compensation should be based on the employee's wages at the time he was exposed to the occupational hazard rather than when the disease manifested itself. The Administrative Law Judge rejected each of the employer's arguments. The Benefit Review Board affirmed all of the ALJ's holdings, despite the fact that a

majority could not be mustered in support of or opposition to the ALJ's view regarding the proper interpretation of the time of injury rule. We conclude that we have jurisdiction notwithstanding the lack of agreement among the Board members, and affirm the decision of the Board. We hold that the employer is completely liable for the occupational injuries sustained by the claimant and that the employee's level of compensation must be based on his wages at the time the injury manifested itself.

I. FACTS

Gerald L. Black was employed in the State of Washington by Todd Shipyards Corporation as a welder from 1942 through 1945. During these three years, Black was exposed to high doses of asbestos in very confined areas.

According to Black's uncontroverted testimony, the asbestos "was all over. You had to wallow in it to do your welding, everything." The asbestos material was thrown about "like snowballs," and on one occasion Black had great difficulty locating a dropped glove because "it was so dusty and dirty down there you couldn't see." In 1945, Black's doctor advised him to leave Todd because of an illness involving vomiting and weight loss. Black was subsequently drafted into the armed forces but failed his medical examination, apparently because of bronchitis and sinus trouble.

Following several years at various outdoor jobs, Black began work for Boeing Aircraft Corporation in 1951. Black worked continuously for Boeing until he was forced to quit in May of 1977 because of periods of nosebleeds and coughing up blood. During his time

with Boeing, Black was also exposed to asbestos on an "off and on" basis. The asbestos at Boeing was found in gloves used to handle hot materials and in the fireproof curtains around welding booths.

On May 27, 1977, surgery was performed to remove the right upper lobe of Black's lung because of a squamous cell carcinoma. While recovering from this surgery, Black was examined by chest disease specialist Dr. Jonathan H. Ostrow. On December 19, 1977, Dr. Ostrow informed Black that he was probably suffering from a form of asbestosis caused by his occupational exposure.

As a result of this diagnosis, Black filed a claim against Todd and its insurer, Fireman's Fund Insurance Company, under the Longshoremens' and

Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq. (1976 & Supp. III 1979) ("the Act" or "LHWCA"). The parties stipulated that Black was permanently and totally disabled when his employment with Boeing terminated in May 1977.

Todd opposed Black's claim for compensation on three grounds. First, Todd argued that Black's disabling lung disease was not related to asbestos exposure while at Todd. Second, Todd claimed that its liability was superseded by Black's subsequent employment for 26 years at Boeing. At the very least, Todd argued, liability should be apportioned between the two employers.[1/] Third, Todd argued that

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1/ Neither party made an effort to join Boeing in the proceedings, nor was any evidence presented that the aircraft company was covered under Section 2(4) of the LHWCA. 33 U.S.C. [cont'd]

Black's compensation should be based on his average weekly wage in 1945, which Todd claimed was the approximate "time of injury" under the Act.

Each of Todd's arguments was rejected by a Department of Labor Administrative Law Judge. Following a full hearing, the ALJ held Todd completely liable for Black's disabling disease and compensated Black based on his weekly earnings at the time the disabling disease was diagnosed in 1977.

Todd appealed this ruling to the three-member Benefits Review Board. Two members of the BRB agreed with the ALJ's conclusion that Todd should be completely liable for Black's disability. These two members, however,

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[cont'd]
§ 902(4) (1976). The ALJ thus presumed that Boeing was not covered by the Act.

had differing views as to the time of injury and, therefore, the appropriate level of compensation. The third Board member believed that Todd should not be liable at all; this member refused even to consider the time of injury issue. Recognizing that two votes were necessary to take official action, the Board issued a per curiam decision affirming the ALJ's holding that compensation should be based on Black's 1977 wages. Each member of the Board then set forth his individual views.

Todd now appeals the BRB's decision. We have jurisdiction to review any "final order of the [Benefits Review] Board" in a case where the "injury occurred" in this Circuit. 33 U.S.C. § 921(c) (1976).

Black, who was 63 at the time of the ALJ's hearing in 1979, died in 1981

-- three months before the Benefits Review Board rendered its decision. His widow, Zella Black, is now the claimant for survivor's benefits under 33 U.S.C. § 909 (1976).

II. STANDARD OF REVIEW

The ALJ's decision is reviewed by the BRB under the "substantial evidence" standard. 33 U.S.C. § 921(b)(3). The BRB must accept the ALJ's findings unless they are contrary to the law, irrational, or unsupported by substantial evidence. Duncanson-Harrelson Co. v. Director, Office of Workers' Compensation Programs, 686 F.2d 1336, 1338 (9th Cir. 1982); Director, Office of Workers' Compensation Programs v. Campbell Industries, 678 F.2d 836, 838 (9th Cir. 1982), cert. denied, 103 S. Ct. 726 (1983). We review BRB decisions for "errors of law and for

adherence to the statutory standard governing the Board's review of the administrative law judge's factual determinations." Bumble Bee SeaFoods v. Director, Office of Workers' Compensation Programs, 629 F.2d 1327, 1329 (9th Cir. 1980). Because the BRB does not make policy, its interpretations of the LHWCA are not entitled to any special deference. Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs, 449 U.S. 268, 278 n.18 (1980); Duncanson-Harrelson, 686 F.2d at 1339.

III. TODD'S LIABLITY - THE LAST COVERED EMPLOYER RULE

There is no dispute that Black was exposed to injurious doses of asbestos at both Todd and Boeing. Moreover, there is little doubt, according to the expert medical testimony presented to

the ALJ, that this asbestos exposure caused Black's disabling lung disease. Indeed, Todd does not dispute the ALJ's finding--supported by ample medical testimony--that Black's inhalation of asbestos was causally related to his lung disease and ultimate disability. Rather, Todd's argument throughout has been that it is completely absolved of liability because of Black's superseding exposure to asbestos during his 26 years at Boeing. In the alternative, Todd contends that liability should be apportioned between the two employers. We reject both of these arguments, as did the ALJ and a majority of the BRB.

Section 3(a) of the LHWCA provides that "[c]ompensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable

waters of the United States." 33 U.S.C. § 903(a) (1976). Black was exposed to the dangerous asbestos while being employed at Todd upon navigable waters and is thus covered by the Act.[2/] Black's employment at Boeing, however, is apparently not covered under the LHWCA.

In a situation where two LHWCA employers may be responsible for a work-related injury or disease,[3/] the last employer is completely liable. After a

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2/ Under the Act "navigable waters" include "any adjoining pier, wharf, drydock, terminal, building way, marine railway, or other adjoining area customarily used by an employee in loading, unloading, repairing, or building a vessel." 33 U.S.C. 903(a). There is no dispute that claimant's job with Todd Shipyards is covered by the Act.

3/ Section 2(2) of the LHWCA defines "injury" as "such occupational disease or infection as arises naturally out of such employment . . . ." 33 U.S.C. § 902(2). See also Fulks v Avondale Shipyards, Inc., 637 F.2d 1008, [cont'd]

full examination of the Act's legislative history, the Second Circuit found that

> Congress intended that the employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award.

Travelers Insurance Co. v. Cardillo, 225 F.2d 137, 145 (2d Cir.), cert. denied, 350 U.S. 913 (1955). See also Cordero v. Triple A Machine Shop, 580 F.2d 1331, 1336-37 (9th Cir. 1978), cert. denied, 440 U.S. 911 (1979); General Dynamics Corp. v. Benefits Review Board, 565 F.2d 208, 212 (2d Cir. 1977).

[cont'd]
1012 (5th Cir.), cert. denied, 454 U.S. 1080 (1981) (a disease arising from occupational exposure is compensable under the Act).

Congress intended that the last employer be completely liable because of "the difficulties and delays which would inhere in the administration of the Act" if attempts were made to apportion liability among several responsible employers. Travelers Insurance Co. v. Cardillo, 225 F.2d at 145. Moreover, the rule apportions liability in a fundamentally equitable manner because "all employers will be the last employer a proportionate share of the time." Cordero v. Triple A Machine Shop, 580 F.2d at 1336.

Todd contends that the last employer rule absolves it of liability because Black was last exposed to asbestos at Boeing. This argument, however, misconstrues the purpose of the rule. Congress did not intend that a company covered by the LHWCA should escape its legal responsibilities

because a subsequent employer not covered by the Act also contributed to the occupational disease. On the contrary, the LHWCA and similar workmen's compensation statutes have been clearly and consistently interpreted to impose liability on the last employer covered by the applicable statute. To accept Todd's position would be to deny LHWCA compensation to many workers who were subjected to injurious stimuli but later worked at other non-covered jobs. Such a result would be contrary to the express purposes of the Act.

The Fifth Circuit's affirmance of a BRB decision in Fulks v. Avondale Shipyards, 10 BRBS 340 (1979) aff'd, 637 F.2d 1008 (5th Cir.), cert. denied, 454 U.S. 1080 (1981), is illustrative. Although Fulks was employed by Avondale Shipyards for 16 years, he was employed

over navigable waters (and thus covered by the LHWCA) for only two months. 637 F.2d at 1010. During those two months, however, Fulks was exposed to harmful sandblasting. Even though Fulks was also exposed to such sandblasting during the bulk of his non-covered employment following his exposure at sea, Avondale was held liable under the LHWCA. Todd's attempt to distinguish this ruling because only one employer was involved is not persuasive. The key to Fulks is that Avondale was held liable even though the employee's final and prolonged exposure to the injurious stimuli occurred in non-covered employment. In short, Fulks establishes that later exposure during a non-covered job does not absolve the covered employer of liability or vitiate the compensatory purposes of the LHWCA.

The Benefits Review Board has applied the last covered employer rationale to cases indistinguishable from the one at hand. In Green v. Newport News Shipbuilding & Dry Dock Co., 13 BRBS 562 (1981), the employee was exposed to asbestos while working for an employer covered under the LHWCA. The employee subsequently worked in a non-maritime job during which he may have been exposed to asbestos. The BRB held that, irrespective of whether the employee was actually exposed during his non-maritime job, Newport News Shipbuilding was completely liable as the last employer covered by the Act. 13 BRBS at 565-66.[4/]

4/ The Fourth Circuit Court of Appeals, in an unpublished memorandum, subsequently vacated and remanded the BRB's decision in Green. Newport News Shipbuilding & Dry Dock Co. v. Green, No. 81-1666 (4th Cir., August 12, 1982). [cont'd]

The last covered employer rule has also been endorsed in state cases where the last employer is located in a state different from that in which the claim is brought. These state decisions commonly place full liability on the last employer covered by that state's workers' compensation laws regardless of whether the claimant was subsequently exposed to dangerous conditions by an out-of-state employer. See generally Green v. Newport News Shipbuilding & Dry Dock Co., 13 BRBS at 565-66 and cases cited therein. See also Garner v. Vanadium Corp. of America, 194 Colo. 358, 572 P.2d 1205, 1206 (1977); Smith v. Lawrence Baking Co., 370 Mich. 169, 121 N.W.2d 684 (1963); Hamilton v. S.A.

[cont'd]
The Fourth Circuit expressed no opinion on the Board's legal interpretation of the last covered employer rule and based its vacation order on other grounds.

Healy Co., 14 App.Div. 2d 364, 221 N.Y.S.2d 325 (1961).

In sum, Todd cannot escape its legal responsibilities by arguing that Black was also exposed to asbestos during later employment. We are not dealing with a case in which Todd has demonstrated that Black's injury resulted exclusively from his employment at Boeing. Todd has made no such showing here. On the contrary, the medical testimony presented to the ALJ led him to conclude that "asbestos exposure to any degree can be harmful" and that Black "had significant asbestos exposure while employed by Todd between 1942 and 1945 which resulted in the pathological lung changes described by" the medical experts. Todd does not credibly dispute the fact that Black was subject to these massive doses of asbestos during his employment there.

The LHWCA does not impose upon the aggrieved worker the overwhelming burden of proving that his disease was caused entirely by the covered employer. All that must be proved is that the covered employer exposed the worker to injurious stimuli in sufficient quantities to cause the disease. Black has made that showing in this case, and Todd cannot excuse its conduct by claiming that a subsequent non-covered employer also exposed Black to asbestos.[5/]

5/ Todd contends that the fact that Black's employment at Boeing is not covered by the LHWCA is irrelevant because state workers' compensation might be available. This argument ignores the fact that the LHWCA establishes a discrete compensation system independent of similar state programs. In United Brands Co. v. Melson, 594 F.2d 1068, 1074-75 (5th Cir. 1979), for example, an employee was permitted to recover under both state law and the LHWCA without having his state award deducted from the federal award. The court found that "[u]nder the [LHWCA], United Brands is fully [cont'd]

Apportionment of liability between Todd and Boeing is not authorized by the LHWCA. Cordero v. Triple A Machine Shop, 580 F.2d at 1337. The same concern for expeditious and efficient compensation that caused Congress to proscribe apportionment among covered employers precludes apportionment between a covered and non-covered employer. Congress' goal was to assure full compensation to industrially

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[cont'd]
liable for Melson's injury. Melson's recovery from [an employer covered under state law] is a mere fortuity. To allow United Brands a set-off is to give United Brands a windfall in the amount of Melson's state award." Id. at 1075.

Moreoever, Black would not be guaranteed an adequate recovery under state law. For instance, the state compensation board might find the occupational disease was caused entirely by Todd or that there was no causal relationship between Black's employment and the disease. The ultimate result might be that full recovery would be denied by both state law and the LHWCA. Congress clearly did not intend that the last employer rule should foster such a result.

injured workers and to remove from LHWCA claimants the burden and delay inherent in litigating complex issues of proportionate liability. During hearings on the LHWCA, Congress rejected an employer-sponsored suggestion that liability should be apportioned, Hearing of Committee on the Judiciary of the House of Representatives, on H.R. 9498, 69th Cong., 1st Sess., April 8, 15, 22, 1926, precisely because "of the overriding importance of efficient administration" of the act. Cardillo, 225 F.2d at 145.

This case clearly illustrates the intractable administrative problems that would be posed by apportionment. Because asbestosis develops only after a long latency period, it is impossible for Black to demonstrate precisely how much of the disease was caused by each individual employer. Requiring a worker

injured under such circumstances to prove proportionate liability might be tantamount to denying him any recovery whatsoever. As a result, apportionment of liability is contrary to the purposes of the LHWCA.6/

The last covered employer rule means, plainly and simply, that the last employer covered by the LHWCA who causes or contributes to an occupational injury is completely liable for that injury. That is true even if the employee

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6/ To guarantee that the LHWCA meets its goal of compensating workers as efficiently as possible, both courts and the BRB have declined to apportion liability in a variety of circumstances. For instance, the Act compensates for occupational injuries that aggravate, accelerate or combine with a prior disease or infirmity. The relative contributions of the accident and the prior disease are not weighed. Independent Stevedore Co. v. O'Leary, 357 F.2d 812, 815 (9th Cir. 1966); Amos v. Robert C. Herd & Co., 13 BRBS 1004, 1006 (1981); Moore v. Paycor, Inc., 11 BRBS 483 (1979).

incurred the injury, in part, while subsequently working for an employer not covered by the Act.

IV. TIME OF INJURY

The ALJ computed Black's level of compensation based on his average weekly wage of $293.86 at the time the asbestosis was diagnosed in 1977. The ALJ thus endorsed the "time of manifestation" definition of time of injury. On the other hand, Todd argued on appeal to the BRB that the time of injury should be determined by the "date of last harmful exposure." Because the last full year Black worked for Todd was 1944, his compensation would be based on his average weekly wage for that year--only 92.00.

On appeal, one member of the BRB agreed with the ALJ's "time of

manifestation" argument, while a second member agreed with Todd's "date of last harmful exposure" theory. The third BRB member thought Todd should not be liable and did not address the compensation issues. The Board decided to affirm the ALJ's decision and compensate Black based on his 1977 average weekly wage.

A. Jurisdiction

Under the LHWCA, only a "final order" of the BRB may be appealed. 33 U.S.C. § 921(c). Since the Act provides that "official action can be taken only on the affirmative vote of at least two members" of the BRB, 33 U.S.C. § 921(b)(2), we must decide whether the

BRB's decision on time of injury is final and thus subject to review.7/

There are two reasons why the Board's current decision must be viewed as final. First, the per curiam opinion issued by all three BRB members explicitly affirmed the ALJ's decision on time of injury. The Board took this

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7/ No party to this case disputes the jurisdiction of this court. Indeed, only the Director of the Office of Workers' Compensation Programs discusses the issue, and he urges us to exercise jurisdiction. Nonetheless, we are obligated to determine whether our jurisdiction has been properly invoked. See, e.g., Washington Local Lodge No. 104 v. Int'l Bhd. of Boilermakers, 621 F.2d 1032, 1033 (9th Cir. 1980); Libhart v. Santa Monica Dairy Co., 592 F.2d 1062, 1064 (9th Cir. 1979).

We clearly have jurisdiction to review the BRB's last covered employee ruling because two members of the Board agreed that Todd should be completely liable. See, e.g., Shaw Construction Inc. v. OSHRC, 534 F.2d 1183 (5th Cir. 1976) (affirming the Commission's 2-0 vote on one violation but reversing and remanding the purported affirmance of a second violation by a 1-1 vote).

action even though there was no majority agreement on the underlying question. The two BRB members who found that Todd should be completely liable expressed differing views on the time of injury issue. The third member never considered that issue because he did not believe that Todd was liable at all. Realizing that two votes are necessary to constitute final action, the Board, in its per curiam opinion, affirmed the ALJ's decision. Although the per curiam opinion may not have any precedential effect because of the inability of two members to agree on a rationale, we find that for purposes of our review the Board's decision is final.

Second, the functions of the BRB do not require that we look beyond the vote to examine the actual reasons for the decision. We have not previously considered the appealability of BRB

decisions affirming an order despite the absence of majority agreement on the reason for the decision, although we have dealt with a similar two member requirement for the Occupational Safety and Health Review Commission (OSHRC). 29 U.S.C. § 661(e) (1970). In Cox Bros., Inc. v. Secretary of Labor, 574 F.2d 465, 467 (9th Cir. 1978), and Willamette Iron & Steel Co. v. Secretary of Labor, 604 F.2d 1177, 1179 (9th Cir. 1979), cert. denied, 445 U.S. 942 (1980), we held that decisions by an equally divided OSHRC to affirm ALJ rulings were not final and therefore not subject to review by this court. Whatever the merits of the Cox-Willamette rule--and it has been expressly rejected by two circuits--we

decline to extend it to the review of BRB decisions under the LHWCA.[8/]

The rationale underlying both Cox and Willamette is that the Commission established under OSHA,

> like other administrative bodies, is congressionally charged with, and therefore presumed to have greater expertise in, the administration of its substantive province. Accordingly, it would not be prudent to review those cases which the Commission itself has elected to review until it has properly done so.

Cox, 574 F.2d at 467 (citation omitted). In Willamette, we also relied strongly on the OSHA Commission's role as a policymaking body. We said that the decision there did not "'necessarily [express] the view of the Commissioners,

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8/ The rule has been rejected by the Third and Fourth Circuits. See n.9 infra. But cf. Shaw Construction Co., 534 F.2d at 1185-86.

or [declare] Commission policy.'" 604 F.2d at 1180 (citation omitted; emphasis in original). We added that a "true affirmance . . . would, of course . . . be declarative of Commission policy." Id. at 1180.

The BRB does not possess any special expertise in the administration of the LHWCA and does not make policy. As the United States Supreme Court has recently held, "the Benefits Review Board is not a policymaking agency; its interpretation of the LHWCA is thus not entitled to any special deference from the courts." Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs, 449 U.S. at 278 n.18. Consequently, the rationale of Cox and Willamette that we should defer until agencies with greater expertise issue majority rulings is inapplicable in the case of the BRB. Moreover, delay

is especially undesirable where, as here, the Board members have set forth their views in separate opinions.

Because the BRB does not make policy and is not entitled to any special deference, we need not look behind the reasons for its per curiam decision to affirm the ALJ's rulings. The BRB's decision on the "time of injury" issue is final and subject to our review.9/

9/ The Director of the Office of Workers' Compensation Programs asks us to reconsider the Cox-Willamette rule in light of the "previously unconsidered views of the Third and Fourth Circuits." The Fourth Circuit's

> review of the legislative history of the Act [29 U.S.C. § 661] reveals no intent to limit judicial review of the Commission's decisions. The evident intent in enacting § 12 was to speed review of administrative citations and to ensure independent review [cont'd]

B. Time of Injury

Section 10 of the LHWCA provides that "the average weekly wage of the injured employee at the time of injury

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[cont'd]
of those citations (citations omitted).

Allowing the ALJ's decision to stand is analogous to the case of split decision affirmances by a court of appeals or the Supreme Court under which the lower court decision is allowed to stand.

George Hyman Construction Co. v. OSHRC, 582 F.2d 834, 837 n.5 (4th Cir. 1978). The Third Circuit also expressly rejected our Cox-Willamette rule because the "quorum requirement" of OSHA means "that, in the context of Commission Review of an ALJ's decision, that decision will stand unless two Commission members vote to the contrary." Marshall v. Sun Petroleum Products Co., 622 F.2d 1176, 1180 (3d Cir.), cert. denied, 449 U.S. 1061 (1980).

In view of our decision not to extend the Cox-Willamette rule to the LHWCA, we need not engage in the reconsideration requested by the Director. We leave to a later date the question of the continued vitality of that rule in OSHA cases.

shall be taken as the basis upon which to compute compensation." 33 U.S.C. § 910 (1976). In most cases of traumatic injury, the time of injury will coincide almost exactly with the time the worker is disabled. When an occupational disease with a long latency period is involved, however, a worker may not become disabled until many years after exposure to the harmful stimuli. Consequently, we must decide whether the injury occurs when the worker was exposed (the "time of last exposure" theory) or when the injury ultimately manifests itself (the "date of manifestation" theory).

Until recently, the BRB had consistently applied the date of manifestation theory. See, e.g., Stark v. Bethlehem Steel Corp., 6 BRBS 600, 603 (1977), reaffirmed on reconsideration, 10 BRBS 350 (1979).

See also Ward v. General Dynamics Corp., 9 BRBS 569 (1978); Keeler v. General Dynamics Corp., 7 BRBS 989 (1978). In Dunn v. Todd Shipyards Corp., 13 BRBS 647 (1981), however, a majority of the Board reversed itself and adopted the time of last exposure approach.10/ Because Dunn is both ill-considered and contrary to the express purposes of the LHWCA, we reject its holding and instead adopt the date of manifestation theory previously followed by the Board. Accordingly, Black's compensation must be computed based on the date his injury manifested itself.

10/ The BRB's decision in the case before us was handed down on the same day as Dunn, and the BRB member who wished to apply the time of last exposure rule relied on Dunn.

(1) The "Time of Manifestation" Approach Best Accomplishes the Purposes of the LHWCA

The paramount goal of the LHWCA is to compensate workers for the loss of wage-earning capacity resulting from occupational injuries and diseases. See generally Palacios v. Campbell Industries, 633 F.2d 840, 843 (9th Cir. 1980); National Steel & Shipbuilding Co. v. Bonner, 600 F.2d 1288 (9th Cir. 1979); 2 A. Larson, Law of Workmen's Compensation § 60.00 (1981). Because a worker's "disability reaches into the future, not the past[,] his loss as a result of injury must be thought of in terms of its impact on probable future earnings." 2 A. Larson, Law of Workmen's Compensation, § 60.11(d). Thus, the Act necessarily focuses on

future earning capacity rather than on some past period of employment.

The BRB's use of the date of last exposure approach in occupational disease cases is completely contrary to the purposes of the Act. Rather than compensating the worker for loss of future earning capacity, the last exposure theory affords compensation on the basis of the wages received when exposure occurred. This is so even when the disease ultimately caused by the exposure does not disable the worker until decades later. In the case at hand, for example, the last exposure approach would compensate Black based on his 1944 weekly wage of $92.00 rather than on the earning capacity he was robbed of when the asbestosis struck in

1977.[11/] Such a result is incompatible with the goals of the LHWCA. The time of manifestation theory we now adopt is far more likely to insure that injured workers will be fairly compensated for their lost future earning capacities.

11/ Although the issue was not thoroughly discussed, Todd mentions the possibility that § 10(h) of the LHWCA was meant to preclude the time of manifestation approach adopted here. § 10(h) was enacted by Congress in 1972 in order to offset, at least in part, the effects of inflation on LHWCA awards. See, e.g., Landrum v. Air America, Inc., 534 F.2d 67, 69-70 (5th Cir. 1976). For those who otherwise qualify under § 10(h)(3), "an injury which resulted in permanent total disability or death which occurred prior to October 27, 1972, shall be considered to have occurred on the day following such date." 33 U.S.C. § 910(h)(3) (1976). If § 10(h)(3) applies, the injured worker's compensation will be based on a percentage of the national average weekly wage. 33 U.S.C. § 910(f), (g) (1976).

We find nothing in the legislative history of § 10(h) to suggest that this section was meant to replace or to preclude the time of manifestation approach. On the contrary, § 10(h) was [cont'd]

The time of manifestation approach also finds support in a realistic definition of the term "injury" as used in section 10 of the LHWCA. Asbestosis begins when asbestos fibers become embedded in the lungs. The average person, however, would not consider himself "injured" merely because the fibers were embedded in his lung. Indeed, expert testimony presented to one court showed that "over 90% of all urban city dwellers have asbestos-related scarring." Eagle-

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[cont'd]
explicitly enacted to offset the effects of inflation on compensation awards then being paid at a rate Congress thought to be inadequate; i.e., awards for injuries that had manifested themselves prior to 1972. See, e.g., Committee on Labor and Public Welfare, Longshoremen's Harbor Workers' Compensation Act Amendments of 1972, S. Rep. No. 92-1125, 92d Cong., 2d Sess., at 622, (1972); H. R. Rep. No. 92-1441, 92d Cong., 2d Sess., at 3, 19 (1972); see also Landrum, 534 F.2d at 69-70. There is no evidence that § 10(h) was intended to deal with those injuries manifesting themselves for the first time after 1972.

Picher Industries, Inc. v. Liberty Mutual Insurance Co., 682 F.2d 12, 19 (1st Cir. 1982). Moreover, "even when the fiber has become embedded in the lung and the scarring process has begun, the end result, that is, disabling disease or death, is by no means inevitable." Id. at 9. Rather, the average person would consider himself injured when the asbestos fibers finally cause asbestosis -- a process that can take much longer than 20 years. Id. at 18. As Judge Learned Hand once wrote, the LHWCA is

> not concerned with pathology, but with industry disability; and a disease is no disease until it manifests itself. Few adults are not diseased, if by that one means only that the seeds of future troubles are not already planted; and it is a common place that health is a constant warfare between the body and its enemies; an infection mastered, though latent, is no longer a disease, industrially speaking, until the

> individual's resistance is again so far lowered that he succumbs.

Grain Handling Co. v. Sweeney, 102 F.2d 464, 466 (2d Cir.), cert. denied, 308 U.S. 570 (1939).

In cases of occupational diseases with long latency periods, the trend is clearly toward the application of the time of manifestation rule. See generally Wilson v. Johns-Manville Sales Corp., 684 F.2d 111, 115-17 (D.C. Cir. 1982). For example, the First Circuit recently held that a disease such as asbestosis "results" under health insurance policies "when it becomes clinically evident, that is, when it becomes reasonably capable of medical diagnosis." Eagle-Picher Industries, 682 F.2d at 25 (footnote omitted). The D.C. Circuit has decided that the statute of limitations regarding

asbestos-related diseases does not begin to run "until that disease becomes manifest." Wilson v. Johns-Manville Sales Corp., 684 F.2d at 112; see also Urie v. Thompson, 337 U.S. 163 (1949) (statute of limitations for silicosis does not begin to run until the dieases manifests itself, even though the disease is often cumulative); Todd Shipyards Corp. v. Allan, 666 F.2d 399, 401 (9th Cir.), cert. denied, 103 S. Ct. 444 (1982) (upholding BRB finding that worker was not injured for purposes of the LHWCA statute of limitations until "he became aware of the full character, extent, and impact of the harm done to him."); Clutter v. Johns-Manville Sales Corp., 646 F.2d 1151 (6th Cir. 1981) (under Ohio law, statute of limitations for asbestos-related disease does not begin to run until disease manifests itself); Grain Handling Co. v. Sweeney, 102 F.2d at 466 (under LHWCA, an

industrial disease is "no disease until it manifests itself"). Cf. Keene Corp. v. Insurance Co. of North America, 667 F.2d 1034 (D.C. Cir. 1981), cert. denied, 455 U.S. 1007 (1982) (both manifestation and exposure dates trigger coverage for asbestos-related diseases under insurance policies).12/

12/ Petitioner raises an additional argument that we believe supports our reading of the Act rather than petitioner's. Petitioner points to the 1972 Amendment to §§ 12(a), 13(a) of the LHWCA adding a phrase to the statute of limitations provisions tolling the statute until the employee is "aware of a relationship between the injury . . . and the employment." Petitioner argues that if "time of injury" meant "time of manifestation" this addition would be unnecessary. On the contrary, this addition strongly supports the view that time of injury must mean time of manifestation.

If "injury" means "exposure" as petitioner argues, then the amendment would not, in fact, toll the statute as Congress intended. An employee is generally aware of the relationship between exposure and his employment from the first exposure. In this case, for

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In sum, the time of manifestation approach best comports with the primary goal of the LHWCA, the concept of disease as understood by both the

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[cont'd]
example, claimant Black was certainly aware from his first days on the job of his exposure to asbestos fibers (the "injury" under petitioner's view) and its relationship to his employment. The amendment would not, therefore, toll the statute for Black and his suit would be barred. Interpreted this way, the statute of limitations would be tolled by this amendment only when the worker is initially unaware of exposure to a substance at his employment. Congress could not have intended such a narrow application for its amendment and there is no support in the legislative history for such an interpretation.

If however, "injury" means "manifestation," then the purpose of the amendment can be understood. Congress intended to remedy casual link problems generated by latent occupational diseases. See Legislative History of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 92nd Cong., 2d Sess. 157 (1972) (remarks of Rep. Daniels). A disease may manifest itself long before the employee becomes aware of its cause. Congress, therefore, tolled the statute until the employee could become aware of the relationship between the disease or injury and its cause--his employment.

medical expert and the average worker, and the trend of judicial opinion. Consequently, for purposes of determining the proper rate of compensation, the time of injury under section 10 of the LHWCA is defined as the date when the occupational disease manifests itself through a loss of wage-earning capacity.

(2) The BRB Had No Justification for Abandoning the Time of Manifestation Approach

In Dunn v. Todd Shipyards Corp., 13 BRBS 647 (1981), a majority of the BRB advanced five reasons to justify its abandonment of the time of manifestation approach in favor of the last exposure rule. In light of the policies that underlie the LHWCA, none of these

reasons is sufficient to justify such a change in policy.

First, the Dunn majority asserted that the time of last exposure is more readily ascertainable and thus likely to reduce litigation. There is no merit to this contention. Because occupational diseases such as asbestosis involve long latency periods, it is almost impossible to determine the exact date on which the harmful exposure occurred. In fact, because the exact date of exposure cannot be easily determined, there might be an incentive in many cases for employers and insurers to litigate the time of injury issue in an effort to limit the amount of the compensation award. As a result, litigation might actually increase under Dunn's date of last exposure rule. See, e.g., Keene Corp. v. Insurance Co. of North America, 667 F.2d at 1043 n.17 (time of

manifestation rule in LWCHA cases is justified by the overriding importance of efficient administration in the workmen's compensation system); Fitzhugh, "Disheartening Prospects: The Stress of Occupational Disease Cases on the Longshoremen's and Harbor Workers' Compensation Act," 22 So. Texas L.J. 471, 483 (1982).

Second, the Dunn majority held that

> since an occupational disease is compensable only if it arises out of and occurs in the course of [covered] employment, . . . the time of injury for determining loss of wage-earning capacity can be causally related to employment only if it is the date on which the claimant was last subjected to the cause of the disease.

Dunn, 13 BRBS at 663 (citations omitted). Once again, however, the BRB has ignored the express language of the LHWCA. The Act's coverage does not

depend on whether the occupational disease or injury manifests itself during the course of employment. On the contrary, we have recently reiterated that the Act's statute of limitations does not begin to run until the worker is "aware of the full character, extent, and impact of the harm done to him." Todd Shipyards Corp. v. Allan, 666 F.2d at 401. All that is required by section 2(2) of the LHWCA is that the injury or disease arise naturally out of the worker's employment. 33 U.S.C. § 902(2) (1976).

Third, the Dunn majority is concerned with the possibility that insurance coverage might have expired for injuries that manifest themselves long after employment terminates. 13 BRBS at 663. However, the BRB fails to explain why the burden of an employer's inadequate insurance coverage should

fall on an innocent disabled worker. Moreover, the BRB cannot point to any examples of inadequate coverage. Indeed, the most common type of workers' compensation insurance covers employers for any injuries sustained during a worker's term of employment; coverage does not usually terminate because injuries manifest themselves after employment has ended. See, e.g., Pennsylvania National Mutual Casualty Insurance Co. v. Spence, 591 F.2d 985, 987 (4th Cir. 1979), cert. denied, 44 U.S. 963 (1980) ("Just as the employer remained liable for the death benefits, even though death occurred after the employee ceased to work for the employer, so did the liability of the insurance carrier under its policy in favor of the employee continue for death benefits originating in the injury occurring when it was the employer's compensation carrier, even though it

thereafter ceased to be the employer's carrier."). In any event, Todd does not argue that its policy with Fireman's Fund Insurance Company is tied to the date of manifestation rather than to Black's period of employment.

Fourth, the Dunn majority argued that the date of last exposure standard would guarantee compensation for workers who are retired when their injuries manifest themselves. 13 BRBS at 663. Although this is a laudable concern, the paramount goal of the LHWCA is to compensate for lost earning capacity. There is some question whether the Act applies to workers who, prior to the time of manifestation of an injury, retire permanently for wholly unrelated reasons. Even if a majority of the Board is correct in its view that the Act does apply to such workers, this fact does not compel a different result

than the one we reach here. If the LHWCA applies to permanently retired workers, we assume that the appropriate level of compensation would be based on the last weekly wage prior to retirement. In any event, we believe the time of manifestation rule leaves sufficient latitude for the BRB and the courts to determine the proper level of compensation in these kinds of cases.

Fifth, the Dunn majority thought it particularly important that the date of last exposure rule protects employers and their insurers from liability disproportionate to that which was anticipated at the time the insurance was purchased. 13 BRBS at 665. Once again, however, the BRB has unjustifiably placed the burden of unanticipated liability on injured workers rather than on employers and insurers. In fact, employers and

insurers are in the best position to predict and compensate for future increases in liability. Moreover, the LHWCA clearly does not intend that employees should be disadvantaged by the failure of employers and insurers to predict future costs accurately. For instance, the 1972 amendments to section 9 of the Act retroactively provide death benefits to survivors of an employee who was permanently disabled by a work-related illness but later died of another cause. Compensation for medical care for an injured worker is not limited by the Act to the cost of such care when the worker was actually employed. Indeed, the Dunn majority is unable to cite any evidence of a congressional intent that the LHWCA should balance the cost of unanticipated liability to insurers and employers against the harm to injured workers. On the contrary, the Act is explicitly

intended to compensate for lost future earning capacity. Employers cannot evade their legal duties under the Act by claiming that they failed to account for increases in liability.

There is simply no sound basis for abandoning the time of manifestation rule. Consequently, we affirm the ALJ's calculation of Black's LHWCA compensation based on the time when the asbestosis manifested itself through a loss of Black's earning capacity.[13]

13/ Related to Todd's argument that compensation should be based on Black's 1944 wages is the claim that the applicable LHWCA provisions should be those in effect in 1944 rather than the current provisions offering more generous benefits. We disagree. Consistent with the Act's policy of compensating for lost future earning capacity, we have held that LHWCA amendments do apply to claims filed after the amendments even though the injury may have occurred before the amendments became effective. See, e.g., [cont'd]

V. CONCLUSION

We agree with the ALJ and the BRB that Todd is wholly liable under the LHWCA for Black's occupational disease. We hold that the last employer covered by the Act is wholly liable even though an industrial injury or disease is caused in part by a subsequent employer who is not subject to the Act. Moreover, we hold that the date the disease manifests itself determines the

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Todd Shipyards Corp. v. Allan, 666 F.2d at 401; Todd Shipyards Corp. v. Witthuhn, 596 F.2d 899, 901-02 (9th Cir. 1979); Dillingham Corp. v. Massey, 505 F.2d 1126, 1129 (9th Cir. 1974).

time of injury for purposes of calculating compensation levels.[14/]

RHM/pww/2b/3F

14/ Subsequent to our decision in this case, the Supreme Court issued its opinion in Morrison-Knudsen Construction Co. v. Director (OWCP), 103 S. Ct. 2045 (1983). In Morrison-Knudsen, the Court held that the term "wages" under § 2(13) of the LHWCA, 33 U.S.C. § 302(193), does not include employer contributions to employee benefit plans. While cautioning that the LHWCA "is not to be judicially expanded because of 'recent trends,'" 103 S. Ct. at 2052 (citation omitted), the Court found that the language of the Act was "plain" and the legislative history provided "abundant indication" that the term "wages" was not meant to include employer contributions to benefits plans. 103 S. Ct. at 2049, 2050.

We have considered the Court's opinion in Morrison-Knudsen and find that it does not require us to change anything we have said. Neither the plain language nor the legislative history of the LHWCA prohibits the time of manifestation approach. This conclusion, in and of itself, distinguishes this case from Morrison-Knudsen. Even more important, we find that in light of both the language and the legislative history of the LWHCA, the time of manifestation approach best accomplishes the purposes of the Act.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TODD SHIPYARDS CORP., AND FIREMAN'S FUND INSURANCE CO.,	)	NO. 81-7494
Petitioners,	)	
vs.	)	ORDER
GERALD L. BLACK, AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,	)	
Respondents.	)	

October 4, 1983

Before: BROWNING, TUTTLE,* and REINHARDT, Circuit Judges

The opinion entered on May 23, 1983 is withdrawn, and the attached Opinion shall be filed forthwith.

RHM/pmw/2b/4F

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TODD SHIPYARDS CORP., AND FIREMAN'S FUND INSURANCE CO., Petitioners, vs. GERALD L. BLACK, AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Respondents.	NO. 81-7494 (Western Washington) ORDER

October 20, 1983

Before: BROWNING, TUTTLE,* and REINHARDT, Circuit Judges

By order dated October 4, 1983 the original opinion in this case was withdrawn and a new opinion filed on that date.

*Hon. Elbert Parr Tuttle, Senior Circuit Judge, United States Court of Appeals for the Eleventh Circuit, sitting by designation.

The panel has voted to deny the petition for rehearing. Judges Browning and Reinhardt have voted to reject the suggestion for rehearing en banc, and Judge Tuttle has made no recommendation for the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

RHM/pww/2b/5F

APPENDIX D

U. S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE
LAW JUDGES

In the Matter of	)	
	)	
GERALD L. BLACK	)	
Claimant	)	
	)	
v.	)	CASE NO. 79-LHCA-1529-S
	)	
TODD SHIPYARDS CORPORATION	)	OWCP NO. 14-35465
Employer	)	
	)	
FIREMAN'S FUND INSURANCE COMPANY	)	
Carrier	)	

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For the Employer
and Carrier

Dated: October 17, 1979

Before: JOSEPH A. MATERA
Administrative Law Judge

DECISION AND ORDER

Jurisdictional and Procedural History

This is a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq. (hereinafter referred to as the Act). Pursuant to a timely notice a formal hearing was held in this matter in Seattle, Washington, on August 15, 1979. Claimant and Todd Shipyards Corporation, Employer (hereinafter referred to as Todd) were represented by counsel who were afforded full opportunity to be heard, to produce relevant evidence, to call, examine and cross-examine witnesses, to make oral argument and to submit post-hearing briefs. The parties entered into substantial stipulations (Tr. p. 5-8), including a stipulation that at the termination of his last employment with the Boeing Aircraft Corporation on May 19, 1977, claimant had reached maximum medical improvement in respect to the impairments in question here and was permanently totally disabled.

Based upon the stipulations of counsel, the entire evidence of record and my observations of the demeanor, appearance and testimony of the witnesses at the time of the hearing, I make the following:

Findings of Fact and Conclusions of Law

Claimant, at the time of the hearing, was a 63-year old welder who was employed by Todd from 1942 through 1945. For approximately one-half of this period he was employed welding pipes, often in confined areas (Tr. p. 17), and in respect to asbestos ". . .

it was all over. You had to wallow in it to do your welding, everything." (Tr. p. 17). He described the asbestos material as being thrown "like snowballs" and on one occasion he dropped his glove and could not at first locate it because "it was so dusty and dirty down there you couldn't see nothing." (Tr. p. 18). He left Todd in 1945 at his doctor's advice following a period of illness involving weight loss and vomiting. He was immediately drafted into the armed services but failed his medical, apparently being informed that he had bronchitis and sinus trouble. (Tr. p. 28 & 30). He then worked outdoors at odd jobs, including two brief monthly periods at the Boeing Aircraft Company between 1946 and 1948. In 1951 claimant began an extended period of employment for the Boeing Aircraft Company until his final termination of all work on May 19, 1977, following a period of coughing up blood and nosebleeds. On May 27, 1977, surgery was performed to remove the right upper lobe of his lung because of a squamous cell carcinoma.

In his some 26 years with the Boeing Aircraft Company, claimant was subjected to further asbestos exposure on an "off and on" basis. (Tr. p. 33). This exposure was "to a different kind of asbestos . . . If you picked up something hot you put on the asbestos gloves." (Tr. p. 31, 32). In addition, there were curtains around a welding booth where he worked on occasion that contained asbestos material. In respect to this curtain the claimant stated:

> It was a curtain-like, you did get exposed to some of it

though, there's no getting around that.

Q. Was it the type of asbestos that you'd be breathing in, the dust?

A. If there were any breaks, or anything else, you do breath it. If it hairs off, but it is a different type of asbestos, entirely. (Tr. p. 23).

I find from these statements by claimant, as well as from medical testimony that asbestos exposure to any degree can be harmful (Tr. p. 79), that claimant was subjected to injurious asbestos stimuli during his employment by Boeing Aircraft Company.

After a period of recovery from his lung surgery, claimant was examined by Dr. Jonathan H. Ostrow, a specialist in internal medicine and diseases of the chest, on December 19, 1977. I find that this was the earliest date at which claimant became aware of the fact that he was possibly suffering from an occupational disease arising out of his prior employment.

It is the contention of Todd, the only statutory employer before me, that claimant's exposure to asbestos while employed by it was not sufficient to have caused asbestosis. It further contends that even if he suffered from such a condition it had no relationship to the onset of the carcinoma of his lung which required his final termination from work.

The key issues in this matter are: (1) did claimant suffer from pathological lung changes due to industrial inhalation of asbestos during his employment by Todd; (2) if claimant has suffered pathological lung changes due to industrial exposure to asbestos while employed by Todd, is it related to the lung carcinoma which resulted in his permanent total disability; (3) who is the last responsible employer, if any, for claimant's disability. Secondary issues in the event of a finding against Todd are the appropriate rate of compensation, medical expenses and attorney fees.

1. Causal Relationship of Claimant's Disability to his Employment by Todd

Section 2(2) of the Act defines the terms "injury" in part as ". . . such occupational disease or infection as arises naturally out of such employment . . . ." The question of the existence of pathological lung changes due to exposure to asbestos as a result of claimant's work with Todd between 1942 and 1945 produced extensive, highly competent but conflicting testimony and reports from medical experts. I give greatest weight in this respect to the thorough reports of Dr. Ostrow (Ex. Nos. C-3, 4) based on his own personal examination of the claimant, as well as his careful review of radiological reports, taken both prior to and following claimant's lung surgery. From his studies of the claimant's history, Dr. Ostrow concluded that the presence of apparent mild but bilateral lower lateral chest wall pleural thickening as well as mild interstitial fibrosis in the lower lung zones established that

claimant had early but definite evidence of pleural and lung fibrosis due to the inhalation of asbestos. Dr. Ostrow points out in his reports that his conclusion is based upon test films taken of the claimant prior to his surgery and thus his findings are not related to any changes which may have taken place as a result of the surgery itself. (Exh. Nos. C-3, 4). Based on the history taken by him from the claimant as well as his medical findings, it was Dr. Ostrow's opinion that claimant, as a result of his industrial exposure to asbestos as a shipyard welder during World War II and intermittent asbestos exposure with the Boeing Aircraft Company, did suffer from definite evidence of pleural and lung fibrosis due to inhalation of asbestos. He reached this medical conclusion despite the inability to indentify asbestos bodies as a result of pathology reports following claimant's surgery. Dr. Ostrow based his opinion instead on claimant's medical history as well as on objective evidence of mild bilateral lower lateral chest wall pleural thickening and mild interstitial fibrosis in the lower lung zones on the pre-surgery chest films he examined. Dr. Ostrow's conclusions were fully supported by the report (Exh. C-5) and extensive testimony of Dr. Robert E. Burdick, also a specialist in internal medicine as well as cancer diagnosis (oncology). (Tr. p. 94). Despite the absence of asbestos bodies Dr. Burdick stated with a ". . . 95 percent of confidence level that this man inhaled significant quantities of asbestos via occupational exposure." (Exh. C-5).

I have fully considered the report as well as extensive and helpful

testimony of Dr. Harry Rein. He stated his opinion that pleural thickening of the chest wall exists in many lung diseases. (Tr. p. 53). However, he did concede that it also makes one think "in the direction of asbestosis . . . and in fairness would have to put that on the positive side." (Tr. p. 76). He generally concluded that claimant did not suffer from any asbestos-related condition and that his lung cancer was in no way due to his industrial exposure at Todd's. I conclude, however, on the basis of the totality of the evidence presented to me that claimant had significant asbestos exposure while employed by Todd between 1942 and 1945 which resulted in the pathological lung changes described by Drs. Ostrow and Burdick.

As to the relationship of claimant's asbestos exposure at Todd to his ultimate lung carcinoma, an additional factor taken into consideration by the examining physicians was claimant's smoking habit over some 40 years until mid-1975, averaging from one to two packs daily. (Exh. No. C-3, Tr. p. 27). Counsel for Todd points out that the type of cancer suffered by claimant, squamous cell carcinoma, was related by Dr. Rein to smoking with odds of 50 to 1. (Tr. p. 70). Both Dr. Ostrow and Dr. Burdick also recognized the relationship of claimant's smoking to the development of his lung carcinoma. However, both of these psychians point out the much heightened risk of bronchogenic carcinoma which results from the combination of asbestos exposure and smoking, ". . . some 92 times above that of a normal population." (Exh. No. C-5).

I have already found that claimant, as a result of his exposure to asbestos arising out of his Todd employment had developed the pathological lung changes described by Dr. Ostrow and Dr. Burdick. In effect, at that time ". . . a time bomb [was] implanted in his lungs, the power of which to disable and destroy became stronger with increased exposure to asbestos dust." Bath Iron Works Corp. v. White, 584 F.2d 569, 576, (5th Cir. 1978). In the words of Dr. Burdick the "co-conspirators" in the implantation of the time bomb in this case were ". . . claimant's asbestos exposure and his cigarette smoking as co-carcinogens with an equal weight placed on each as inciting factors in the development of his lung carcinoma." (Exh. No. C-5). As the Board has recently re-affirmed, ". . . it is sufficient if a work-related accident or occupational disease was aggravated, accelerated or combined with a disease or infirmity to produce disability for which compensation is sought, and the relative contribution of the work-related injury and the prior disease is not weighed." Moore v. Paycor, Inc., et al., ___ BRBS ___, BRB No. 78-368 (1979). I find, therefore, that claimant's present employment-related disability is compensable under the Act.

2. Application of the Last Employer Rule

In the addendum to its brief Todd argues that any viable recovery by claimant can only be had against his last employer of some 26 years, the Boeing Aircraft Company. As noted above, claimant worked for Boeing for short periods after leaving Todd in 1945 and then began long-term employment

there in 1951, until he discontinued work in 1977. Neither the claimant nor Todd made any apparent effort to join Boeing as a proper party in the matter, nor has either party raised any question or presented evidence that the aircraft firm was an "employer" under section 2(4) of the Act. I therefore draw the reasonable inferrence that Boeing Aircraft Company was not a maritime employer as that term is defined under section 2(4) of the act.

Legislative efforts in a number of states to apportion liability for disability among successive employers, particularly in occupational disease cases, have been successfully made. See Larson's Workmen's Compensation Law, Vol. 4, Feb. 1979, Cumulative Supp., § 95.30, et seq. However, in respect to occupational disease the Benefits Review Board in Sicker v. Muni Marine Company, et al., 8 BRBS 268, 271 (1978) has recently reaffirmed that:

> In cases such as this, involving years of exposure to occupational hazards and consequent disease and disability, the policy of the Act has been to avoid the dilemma of apportioning liability against successive employers by assessing full liability against claimant's last employer. This 'last employer' test as formulated in the leading case of Traveler's Insurance Co. v. Cardillo, 225 F.2d 137 (2nd Cir 1955), Cert. denied sub nom. Ira S. Bushey Co. v. Cardillo, 350 U.S. 913 (1955) is:

> . . . the employer during the last employment in which the claimant was exposed to injuries stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award. (Emphasis added.)

Traveler's Insurance Co., supra, at 145. This language was applied by the Board in Warren v. Jacksonville Shipyards Inc., 1 BRBS 184, BRB No. 74-144 (Nov. 13 1974) and Melson v. United Brands Co., 6 BRBS 503, BRB No. 76-277 and 76-227A (Aug. 23, 1977) . . . .

Other cases in which the Board has applied the "last employer rule" are: Proffitt v. E. J. Bartells, et al., 10 BRBS 435 (1979); Fulks v. Avondale Shipyards, Inc., 10 BRBS 340 (1979); Schweitzer v. Lockheed Shipbuilding, et at., 8 BRBS 257 (1978); Corwin v. Arthur Tickle, 8 BRBS 170 (1978); McCabe v. Sun Shipbuilding and Dry Dock Co., 1 BRBS 509 (1975), rev. on other grounds, 593 F.2d 234 (3rd Cir. 1979). It is important to note that in the application of the rule in all of the above-cited cases, the claimant was left with a last responsible "maritime employer" under the Act from which to recover. Thus, in the McCabe case, supra, at p. 514, the Board expressed reluctance to apply any allocation

between the state and federal acts in that no basis exists for such an allocation. In effect, the rule has never been applied to deny a claimant his entitlement under the Act, but merely to determine the appropriate assessment of liability among successive employers, whose potential liability to the claimant could be determined under the Act. In Fulks v. Avondale Shipyards, Inc., supra, the Board, for example, rejected argument by the employer that the last employer rule barred recovery for occupational disease by a claimant on the basis that his last period of employment for that same employer had been performed entirely ashore where state jurisdiction was appropriate. The Board stated:

> Traveler's is a rule of liability assessment, not jurisdiction. Exposure upon navigable waters is sufficient to bring the claim within the Act. The fact that other exposures were within coverage of a state Act does not limit the applicability of the Act to the aggravation of a condition which is thus concurrently within a State's jurisdiction. See Calbeck v. Traveler's Insurance Co., 37 U.S. 114.

It is axiomatic that the Act's remedial legislation ". . . must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongrous results. Voris v. Eikel, 346 U.S. 328, 333 (1953)." Northeast Marine Terminal Co., Inc., et. al. v. Caputo, et al., 432 U.S. 249, 6 BRBS 150 (1977). Thus, following the

rationale of the Fulks and McCabe decisions, supra, I conclude that the "last employer" rule as it is applied under the Act is to determine liability assessment among statutory employers only, as that term is defined in section 2(4) of the Act.

In the instant action, the only such "employer" before me over whom I have jurisdiction under the Act to assess for benefits is Todd. Whether Boeing may also be liable for benefits under a concurrent state workmen's compensation statute has not been raised nor would it be an appropriate issue for my determination. Whether Todd may reach Boeing under a state statute requiring contribution among successive employers is for Todd to pursue in another forum. Rather, it is only for me to decide whether or not Todd is liable, under the Act, to the claimant for benefits.

I find that Todd's reliance on the last responsible employer rule to avoid payment to the claimant is without merit since the rule is only one of liability assessment among statutory employers. Fulks v. Avondale Shipping, Inc., supra. Having found that claimant's occupational disease and resultant cancer arose in part from his employment by Todd I therefore conclude that Todd, the only statutory employer before me, is totally responsible for the payment of all benefits to which the claimant is entitled in this matter.

Counsel for Todd has brought to my attention on a post-hearing basis the recent decision of Administrative Law Judge Heyer in Geisler v. Columbia Asbestos Inc., et al., 10 BRBS 35, 1979

(ALJ), involving a factually similar matter. Judge Heyer, applying the last employer rule, denied benefits. I have reached a different conclusion than Judge Heyer on this issue for the reasons set forth above.

3. Average Weekly Wage

Counsel in a post-hearing stipulation (ALJ Exh. No. 1), agreed that claimant's average weekly wage for the last full year he worked for Todd in 1944 was $92.00, for the first year he worked for Boeing in 1952 was $86.00, and for the last year of his employment at Boeing in 1977 was $293.86. It is Todd's argument that any award against it should be based on his earnings at the time he allegedly sustained his injury in that employment in 1944 and 1945. In a similar case, Stark v. Bethlehem Steel Corporation, et al., 6 BRBS 600 (1977), the decedent ship worker also sustained his injurious exposure to asbestos between 1942 and 1945, but did not learn of the relationship of his condition to his employment until 1972. The Board held that in occupational disease cases, to avoid having a claimant suffer an unconscionable diminution in compensation rate where the disease does not manifest itself over a long number of years, that the date of the injury for the purposes of section 10 of the Act is the date when the disease becomes manifest. Stark, supra, at p. 603. This case is explicit authority for a finding therefore that claimant's average weekly wage for the purposes of his compensation award if $293.86, his earnings in December 1977, the earliest date that he was first made aware of his occupational disease and its

relationship to Todd employment through Dr. Ostrow's examination.

4. Penalty, Interest and Attorney Fee

It was stipulated that Todd had notice of the claimant's alleged injury on June 5, 1978, and had filed a number of notices of controversion beginning on March 23, 1978. The notice of controversion was therefore timely and claimant is not entitled to any penalty award under section 14(e) of the Act. However, the claimant is entitled to a mandatory six percent penalty on all payments of this award from May 19, 1977, until actual payment. Harris v. Marine Terminals Corp., 8 BRBS 712, 714 (1978).

Claimant's counsel has requested an attorney's fee of $5,000.00 based on his detailed itemization of services constituting some 42.50 hours of attorney's time. I have examined this itemization of services carefully. I feel that claimant's counsel is entitled to $100.00 per hour for attorney's services provided in this case. This matter involved complexed issues both of a medical and legal nature which were vigorously and very competently litigated by both counsel. Cf. Morris v. California Stevedore and Ballast Co., 10 BRBS 375 (1979). However, I feel that the amount of time claimed by counsel is excessive, particularly in respect to the items dated 4/25/78, 5/22/78, 6/6/78, 6/11/78, 6/28/78, 9/7/78, 10/17/78, 10/20/78, 10/15/78, 10/26/78, 3/7/79, 5/11/79, 6/15/79, 6/25/79, 6/25/79, 7/2/79, 8/1/79. The time claimed by counsel was calculated to the nearest one-quarter hour. Most of these items involved "review" of

rather perfunctory documents (i.e., notices of hearing, form letters, etc.), for which a quarter hour's time is unnecessary. Counsel's claimed time is therefore reduced to 40 hours and a fee in the total amount of $4,000.00 is awarded, to be assessed against Todd.

Claimant is also entitled to medical services and supplies in connection with all physical impairment arising out of and related to his exposure to asbestos while employed by Todd from 1942 to 1945.

All computations provided for herein are to be made by the Deputy Commissioner in accordance with the terms of this decision and order, and applicable provisions of the Act and regulations. All computations set forth herein are subject to verification by the Deputy Commissioner.

Order

It is therefore Ordered that:

1. Todd Shipyards Corporation, employer and Fireman's Fund Insurance Company, carrier, shall pay to the claimant compensation for permanent total disability commencing on May 19, 1977, to the present and continuing at the rate of $195.90 based on an average weekly wage of $293.86. These payments shall be further periodically adjusted in accordance with section 10(f) of the Act. The employer shall also pay interest on all compensation due at the rate of six percent per annum from May 19, 1977 until the date of payment.

2. Respondent shall pay for or reimburse claimant for costs of such

medical services and supplies as have been in the past and are in the future required for all impairments arising out of his occupational disease as a result of asbestos exposure while employed by Todd Shipyards Corporation between 1942 and 1945.

3. Todd Shipyards Corporation shall pay directly to Christopher M. Egan, Esquire, the sum of $4,000.00, as a total legal fee for services rendered on behalf of the claimant.

JOSEPH A. MATERA
Administrative Law Judge

Dated: October 17, 1979
San Francisco, California

JAM:scm

RHM/pww/2b/6F

APPENDIX E

BENEFITS REVIEW BOARD

U. S. DEPARTMENT OF LABOR

No. 79-706

GERALD L. BLACK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TODD SHIPYARDS CORPORATION	)	
	)	
and	)	
	)	
FIREMAN'S FUND INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION AND ORDER

Dated and Filed: June 12, 1981

Appeal from the Decision and Order of Joseph A. Matera, Administrative Law Judge, United States Department of Labor.

Christopher M. Egan (Walthew, Warner, Keefe, Arron, Costello & Thompson), Seattle, Washington, for the claimant.

Robert H. Madden (LeGros, Buchanan, Paul & Madden), Seattle, Washington, for the employer/carrier.

Before: SMITH, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

PER CURIAM:

This is an appeal by Todd Shipyards Corporation and Fireman's Fund Insurance Company (hereinafter, Todd Shipyards) from a Decision and Order (79-LHCA-1529-S) of Administrative Law Judge Joseph A. Matera pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq. (hereinafter, the Act). Employer appeals both the administrative law judge's determination that it is the party liable for benefits and the administrative law judge's determination as to claimant's average weekly wage.

Claimant was employed as a welder by Todd Shipyards between 1942 and 1945. During this time, claimant had extensive exposure to asbestos. From 1945 until 1951, claimant worked at vrious odd

jobs. In 1951, he began employment at Boeing Aircraft Company (hereinafter, Boeing). Claimant was exposed to asbestos during his employment with Boeing. Claimant terminated his employment with Boeing on May 19, 1977, following a period of illness. Claimant sought compensation for permanent total disability from May 19, 1977, and continuing.

The administrative law judge found that claimant had pathological lung changes as a result of his employment with Todd Shipyards. He awarded the claimant compensation for permanent total disability from May 19, 1977, based on an average weekly wage of $293.86, his last wage with Boeing. Todd Shipyards was held liable for benefits.

Todd Shipyards appeals, arguing that Boeing rather than Todd Shipyards should be liable for any benefits due.

Alternately, Todd Shipyards contends that it should be only responsible for any damage caused by exposure during its employment. Todd Shipyards also disputes the administrative law judge's determination of claimant's average weekly wage. The main thrust of employer's argument is that the Board's holding on average weekly wage in Stark v. Bethlehem Steel Corp., 6 BRBS 600 (1977), reaff'd, 10 BRBS 350 (1979), was in error.

The Board is unable to reach full agreement in this case. Administrative Appeals Judges Kalaris and Miller agree that Todd Shipyards should be held liable for benefits. The administrative law judge's holding on this point is therefore affirmed. However, Judges Kalaris and Miller cannot agree on the method of calculating benefits. Chief Administrative Appeals Judge Smith does not agree that Todd Shipyards should be

held liable. Accordingly, he does not reach the issue of the amount of benefits due. Since official action can be taken only on the concurring vote of at least two members, 20 C.F.R. §801.301, we consequently hold that the Decision and Order of the administrative law judge as to the method of calculating benefits must stand. The administrative law judge's decision becomes the final order of the Board and is, as between the parties, a conclusive determination and adjudication of the matter adjudged. Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed. However, we take this opportunity to express our individual opinions as to how the issues raised should be resolved.

KALARIS, Administrative Appeals Judge:

In finding Todd Shipyards liable for benefits, the administrative law judge determined that the last employer rule only determines the liability assessment between employers covered under the Act. Finding only Todd Shipyards covered under the Act, the administrative law judge found it to be the responsible employer. Employer argues that the last employer rule should not be limited to apply only to employers under the Act and, hence, since claimant was exposed to asbestos while employed by Boeing, Boeing should be liable for benefits pursuant to the state act. The Board rejected this argument in Green v. Newport News Shipbuilding & Dry Dock Co., BRBS , BRB No. 80-107 (June 12, 1981). There the Board held that the last employer covered by the Act in whose employment claimant received exposure to

harmful stimuli is liable for benefits. Accordingly, Todd Shipyards, not Boeing, is responsible for benefits in this case.

Todd Shipyards also argues that it should be claimant's burden to show that Boeing is not covered under the Act and therefore not responsible under the last employer rule. I cannot agree. The last employer rule is a judicially developed rule for allocating liability. Employer may defend against a claim by attempting to place liability on another party. It should not be claimant's burden to raise for employer its defenses.

In the alternative, Todd Shipyards contends that, assuming Boeing cannot be found liable for all benefits, employer should only be responsible for any harm it caused and should not be liable for any damage caused by exposure during claimant's later employment with Boeing.

In other words, liability should be apportioned between the two employers.

The Board has held, as a general rule, that employers are not liable for injuries and other conditions which arise subsequently and are not related to the initial injury. See Leach v. Thompson's Dairy, 13 BRBS 231, BRB No. 79-143 (1981). However, Todd Shipyards has made no showing that claimant's current physical condition is either totally unrelated to employment with employer, or is only in certain part related to this employment with Todd. See generally Green, supra; Kelaita v. Triple A Machine Shop, BRBS , BRB No. 78-576 (March 13, 1981). [Employer has made no such showing in this case. Moreover, if it is determined that only a portion of the condition is related to employment with employer, a determination as to the nature and extent of claimant's disability based on

this physical condition together with other pre-existing conditions must still be made.]

As concerns employer's argument relative to the determination of claimant's average weekly wage, the Board has recently addressed this question in Dunn v. Todd Shipyards Corp., BRBS , BRB No. 78-410 (June 12, 1981) and Verderane v. Jacksonville Shipyards, Inc., BRBS , BRB No. 76-244 (June 12, 1981). In Dunn, the Board held that claimant's average weekly wage should be based on the date of his last exposure to harmful stimuli. In Verderane, the Board noted that the average weekly wage would be based on the exposure with the last covered employer. Accordingly, claimant's compensation must be based on his average weekly wage for his last full year at Todd Shipyards. This was stipulated to be $92.00. Accordingly,

the award should be modified to reflect that compensation be based on an average weekly wage of $92.00. The award should also be subject to all applicable Section 10(h) adjustments. 33 U.S.C. §910(h).

ISMENE M. KALARIS
Administrative Appeals Judge

MILLER, Administrative Appeals Judge:

I concur with Judge Kalaris that Todd Shipyards should be held liable for benefits in this case. See Green v. Newport News Shipbuilding & Dry Dock Co., BRBS , BRB No. 80-107 (June 12, 1981). However, I would hold that claimant's average weekly wage, and therefore his compensation rate, should be determined as of the "date of injury" as I more fully explained in my dissenting opinion in Dunn v. Todd Shipyards Corp., BRBS , BRB No. 78-410 (June 12, 1981). In Dunn, I

explained that defining the "date of injury" for purposes of determining claimant's average weekly wage in occupational disease cases as the date that the occupational disease manifests itself through a loss of wage-earning capacity most appropriately implements the policies underlying both Section 10 and the Act. Therefore, I would remand this case to the administrative law judge for a determination of the claimant's compensation in accordance with my dissenting opinion in Dunn.

JULIUS MILLER
Administrative Appeals Judge

SMITH, Chief Administrative Appeals Judge:

In the Decision and Order below, the administrative law judge concluded that Boeing Aircraft Company was not a maritime employer within the meaning of

Section 2(4) of the Act, 33 U.S.C. §902(4). Accordingly, a threshold question was raised as to the effect of that determination upon the Cardillo rule[1/] for liability assessment in occupational disease cases involving successive employers.

My colleagues essentially have concluded that the employer responsible for the payment of compensation for disability due to injury in occupational disease cases is the last employer in whose employment claimant was exposed to harmful stimuli prior to the date on which claimant became aware of the fact that he was suffering from a work-related occupational disease: Provided, that when the last employer is not a maritime employer within the meaning of

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1/ Travelers Insurance v. Cardillo, 225 F.2d 137 (2d Cir. 1955), cert. denied sub nom. Ira S. Bushey & Sons, Inc. v. Cardillo, 350 U.S. 913 (1955); see discussion, infra.

Section 2(4), liability may be imposed against the last employer over whom jurisdiction can be asserted under the Act.

In my opinion, the proviso imposed by my colleagues upon the Cardillo rule is not in accordance with law. Therefore, I would hold that when the last employer is not a maritime employer within the meaning of Section 2(4), claimant is precluded from obtaining benefits under the Longshoremen's and Harbor Workers' Compensation Act. For reasons more fully explained below, this result is mandated by the fact that, in cases involving successive employers, as a threshold matter, the Cardillo rule must be invoked so as to identify the responsible employer, that is, the last employer with whom claimant sustained exposure to injurious stimuli. Once the liable employer has been recognized, a secondary inquiry must be conducted so

as to determine whether jurisdiction properly may be exercised under the coverage provisions set forth in Sections 2(3), 2(4), and 3(a) of the Act. 33 U.S.C. §§902(3), 902(4), 903(a).

The last injurious exposure rule was initially applied to Longshore Act proceedings in the landmark case of Travelers Insurance Co. v. Cardillo, 225 F.2d 137 (2d Cir. 1955), cert. denied sub nom. Ira S. Bushey & Sons, Inc. v. Cardillo, 350 U.S. 913 (1955). The Court therein concluded,

> Congress intended that the employer during the last employment in which the claimant was exposure to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from a occupational disease arising naturally out of his employment, should be liable for the full amount of the award.

Cardillo, supra, 225 F.2d at 145. Thus, based upon the legislative history of

the Act and administrative considerations, the last injurious exposure rule became the means of liability assessment in cases arising under the Act. See General Dynamics Corp. v. Benefits Review Board, 565 F.2d 208, 7 BRBS 831 (2d Cir. 1977). The rule enunciated in Cardillo is generally characterized as a national rule of liability determination, inasmuch as it is followed by most states, with and without legislative modification. See General Dynamics Corp., supra; Cordero v. Triple A Machine Shop, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), cert. denied, 444 U.S. 911 (1979); Mathis v. State Accident Insurance Fund, 499 P.2d 1331 (Col. App. 1972); Alloy Surfaces Co. v. Cicamore, 221 A.2d 480 (Del. 1966); Underwriters at Lloyd's of London v. Alaska Industrial Board, 160 F. Supp. 248 (D.Alas. 1958). See generally 4

Larson, The Law of Workmen's Compensation, §95.00 et seq. (1981).

Although the last injurious exposure rule was intended to alleviate problems inherent to liability assessment in the case of successive employers, the essential nature of occupational disease cases has at times impaired the ease with which the rule might be applied. Accordingly, problems have arisen where disability occurs outside of the jurisdiction of the forum from which an employee seeks compensation. See 4 Larson, supra, §95.22. As noted by the administrative law judge in the instant proceedings, the jurisdictional dilemma herein presented is an issue of first impression, inasmuch as in earlier Longshore Act cases the "last employer" was a maritime employer within the meaning of the Act. See Decision and Order at 7.

In support of its construction and application of the Cardillo rule, my colleagues previously have cited as authority the proportedly analogous treatment of jurisdictional questions arising in prior Board cases and in state court decisions. See Green v. Newport News Shipbuilding and Dry Dock Co., BRBS , BRB No. 80-107 (June 12, 1981). However, it is my view that neither of the sources upon which my colleagues relied sanctions the result herein obtained.

In Fulks v. Avondale Shipyards, Inc., 10 BRBS 340 (1979), aff'd 637 F.2d 1008, 12 BRBS 975 (5th Cir. 1981), exposure to injurious stimuli was incurred by the employee at Avondale on sites within and outside of the coverage of the Longshore Act. Invoking the Cardillo rule, the majority concluded that Avondale Shipyards was the last employer for whom claimant worked and,

therefore, the claim was within the scope of the Act by virtue of the fact that claimant had earlier incurred injurious exposure at a covered situs.[2/] On the basis of its Fulks ruling that subsequent exposure to injurious stimuli at a non-covered situs does not relieve an employer of liability when claimant ws initially exposed at a covered situs, my colleagues have now concluded that in cases involving successive employers, subsequent exposure by a non-covered employer does not relieve the first employer of liability.

However, in my opinion, the proposition cited by my colleagues is unsupported by case precedent. The reasoning in the Fulks line of cases was

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2/ See also Verderane v. Jacksonville Shipyards, Inc., BRBS , BRB No. 76-244 (June 12, 1981); McCabe v. Sun Shipbuilding & Dry Dock Co., 1 BRBS 509 (1975), rev'd on other grounds, 593 F.2d 234 (3d Cir. 1979).

based upon the fact that the claimant sustained exposure to injurious stimuli, on and off covered sites, while in the employ of a single employer. Assessment of liability against the singular employer was mandated because, were a contrary result reached, "any employer could simply shift an employee to a non-covered employment after years of injurious exposure, and frustrate the purposes of the Act." Fulks v. Avondale Shipyards, supra, 10 BRBS at 345.

The foregoing discussion reveals that the relevance of the Cardillo rule to Fulks implicitly arose with regard to whether "apportionment" was appropriate between state and federal acts, assuming that claimant was not restricted to a state remedy. So as to prohibit the issue of coverage from turning on employer's assignment policies, the majority held that federal jurisdiction existed by means of exposure on a

covered situs. Once jurisdiction was established, the Cardillo rule was invoked so as to render the single maritime employer fully liable under the federal Act. In so ruling, the majority observed that the Cardillo holding was a rule of liability assessment, not of jurisdiction.

In the instant case, jurisdiction may not be asserted over the sole employer against whom liability must be assessed, inasmuch as the employer with whom claimant last sustained exposure to injurious stimuli is not a maritime employer under Section 2(4) of the Act. Since Cardillo is a rule of liability assessment, not one of jurisdiction, Cardillo cannot be nullified by the assertion of jurisdiction over a covered employer in whose employ claimant was not last exposed to harmful stimuli.

It is also my view that my colleagues' position is unsupported by

the state case law to which they briefly alluded in Green, supra. State court decisions examining the issue of jurisdiction in occupational disease cases generally have been directed towards interpreting statutes which codify the last injurious exposure rule. Accordingly, the issue under consideration by state courts is whether the "last employer" to whom the state statute refers signifies the last employer over whom the forum has jurisdiction or alternatively, the last employer in point of time alone (over whom the forum may not, in all cases, assert jurisdiction).

As my colleagues suggested in Green, supra, state courts occasionally have construed their statutes so as to allow the assertion of claims against the last employer over whom jurisdiction may be asserted. See, e.g., McKee v. Armstrong Contracting & Surety Co., 404

N.Y.S. 2d 759 (63 A.D. 2d 791 (1978); Garner v. Vanadium Corporation of America, 572 P.2d 1205 (Col. 1977); Smith v. Lawrence Baking Co., 121 N.W. 2d 684, 370 Mich. 169 (1963). However, in some instances, jurisdiction has been exercised by virtue of long-arm statutes. See, e.g., Rodwell v. Pro Football, Inc., 206 N.W. 2d 773, 45 Mich. App. 408 (1973). Moreover, other forums have declined to assert jurisdiction in cases wherein the last injurious exposure occurred outside state boundaries. See, e.g., State Compensation Fund v. Joe, 543 P.2d 790, 75 Ariz. App. 361 (1975).

In any event, I decline to accept as controlling decisions which have been issued in conjunction with state proceedings. It does not follow that, because the Longshore Act cannot be binding upon a non-covered employer, liability must shift to an employer over

whom the Act affords jurisdiction. To so rule would assume that Congress intended to accord benefits to all claimants who, at some stage during their employment history, might have established coverage under the Act. However, it is settled beyond peradventure that the amended Longshore Act supplements, rather than supplants state compensation law. See Sun Shipbuilding, Inc. v. Commonwealth of Pennsylvania, 100 S.Ct. 2432 (1980).[3/] Accordingly, if jurisdiction cannot be established pursuant to the federal Act, an employee may pursue a remedy under state law.

When an employee has for years labored for a maritime employer, and then sustains injurious exposure during a negligible period of employment with a

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3/ Cf. Thomas v. Washington Gas Light Company, 100 S.Ct. 2647 (1980).

second, non-maritime employer, the denial of federal benefits may appear unjust. However, the evidence adduced in the instant case establishes that claimant was employed by Todd Shipyards for approximately three years, during which time he was exposed to harmful stimuli. He was next engaged in miscellaneous employment for a period of six years. Finally, he worked at Boeing, sustaining exposure to injurious stimuli in the course of 26 years of employment. Even assuming that there was a causal relationship between the Todd Shipards employment and claimant's condition; to assess full liability against Todd without consideration of the exacerbation sustained during claimant's 26 years at Boeing is unjust and unconscionable under the circumstances herein presented. Moreover, the assessment of liability against Todd, rather than the last

employer as identified by the Cardillo rule, is unsupported by precedent and violative of the jurisdictional provisions of the Act.

Unless and until Congress alters the current scheme of liability assessment, the Cardillo rule must be applied in accordance with the jurisdictional mandate set forth in the Act. Inasmuch as the solely responsible employer herein is immune from liability, I disagree with the result obtained in the instant case. Since I would deny the claim on the ground that jurisdiction may not be exercised over the responsible employer, I do not reach the issue of average weekly wage.

SAMUEL J. SMITH, Chief
Administrative Appeals Judge

Dated this 12th
day of June 1981

RHM/pww/2b/7F

APPENDIX F

BENEFITS REVIEW BOARD

U. S. DEPARTMENT OF LABOR

No. 78-510

MARIE M. DUNN (Widow of ARTHUR J. DUNN)	)	
Claimant-Petitioner	)	
v.	)	
TODD SHIPYARDS CORPORATION	)	
and	)	
FIREMAN'S FUND INSURANCE COMPANY	)	
Employer/Carrier-Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION and ORDER
Party-in-Interest	)	

Appeal from the Decision and Order and Supplemental Decision and Order of John D. Henson, Administrative Law Judge, United States Department of Labor.

William C. Decker (Levinsen, Friedman, Vhuger, Duggar, Bland & Horowitz), Seattle, Washington, for the claimant.

Robert N. Holland (Bogle & Gates), Seattle, Washington, for the employer/carrier.

Catherine A. Giacona (T. Timothy Ryan, Jr., Solicitor of Labor; Laurie M. Streeter, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Edward J. Murphy (Murphy & Beane), Boston, Massachusetts, for General Dynamics Corporation, amicus curiae.

Thomas E. Cinnamond and Rudolph L. Rose (Semmes, Bowen & Semmes), Baltimore, Maryland, for Bethlehem Steel Corp., amicus curiae.

W. Boyd Reeves (Armbrecht, Jackson, Demouy, Crowe, Holmes, & Reeves), Mobile, Alabama, for Alabama Dry Dock and Shipbuilding Co., amicus curiae.

Kathryn E. Ringgold (Airola & Ringgold), San Francisco, California, on their own behalf, amicus curiae.

Charles R. Priest (McTeague, Higbee & Tierney), Brunswick, Maine, for Local No. 6, Industrial Union of Marine and

Shipbuilding Workers of America, AFL-CIO, amicus curiae.

Stewart E. Niles (Jones, Walker, Waechter, Poitevent, Carrere & Denegre), New Orleans, Louisiana, for Shipbuilders Council of America, amicus curiae.

Robert R. Hatten (Patten & Wornom), Newport News, Virginia, for 200 Present or Former Employees of Newport News Shipbuilding and Dry Dock Co., amicus curiae.

Thomas D. Wilcox (Wilcox & Sharood, P.C.), Washington, D.C., for the Alliance of American Insurers and The National Association of Independent Insurers, amici curiae.

Stephen C. Embry (O'Brien, Shafner, Bartinik, Stuart & Kelly), Groton, Connecticut, on their own behalf, amicus curiae.

Paul M. Franke, Jr. and Trudy Lumpkin Clark (White & Morse), Gulfport, Mississippi, for Ingalls Shipbuilding Division, Litton Systems, Inc., amicus curiae.

Ala Hamilton-Day (Galfand, Berger, Senesky, Lurie & March), Philadelphia, Pennsylvania, for Local 802 at Sun Shipbuilding and Dry Dock Co., Inc., amicus curiae.

Before: SMITH, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

KALARIS, Administrative Appeals Judge:

This is an appeal by the claimant from the Decision and Order and Supplemental Decision and Order (78-LHCA-582-S) of Administrative Law Judge John D. Henson pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq. (hereinafter, the Act). This appeal involves Section 10 of the Act which requires that an injured employee's compensation for disability and death be based on the employee's average weekly wage "at the time of injury." 33 U.S.C. §910.[1/] The question of primary

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1/ Section 10 of the Act, 33 U.S.C. §910, provides in pertinent part:

[cont'd]

importance before us is when does the "time of injury" occur in cases of occupational disease. We hold that, for purposes of Section 10, "time of injury" is the date on which the employee is last exposed to the injurious stimuli which causes his disease.

The claimant in this case is the widow of Arthur J. Dunn, and brought this claim for disability on behalf of her husband and for death benefits. Arthur J. Dunn was exposed to asbestos fibers between 1942 and 1944 or 1945 while working for Todd Shipyards Corporation (hereinafter, the employer) as a steam fitter and pipe fitter. He thereafter worked for three different wholesale plumbing supply companies

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[cont'd]
Except as otherwise provided in this Act, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation . . .

until 1966 or 1967, when he ceased work for a year. He then performed odd jobs for the local Catholic parish. None of Mr. Dunn's employment subsequent to 1944 or 1945 involved exposure to asbestos fibers. In August of 1975, Mr. Dunn became bedridden and, after admission to the hospital on September 15, 1975, died on January 27, 1976. An autopsy performed the following day showed that the cause of death was lung cancer, pulmonary asbestosis, and chronic obstructive pulmonary disease.

In a Decision and Order dated August 3, 1978, the administrative law judge concluded that Mr. Dunn's death was the result of an occupational disease causally related to his exposure to asbestos fibers between 1942 and 1944. He awarded death benefits and compensation for permanent total disability from September 15, 1975, to January 26, 1976. In calculating the

decedent's average weekly wage, the administrative law judge applied the Board's decisions in Stark v. Bethlehem Steel Corp., 6 BRBS 600 (1977), reaff'd on reconsideration, 10 BRBS 350 (1979) (hereinafter referred to as Stark I and Stark II) which held that the average weekly wage in occupational disease cases is to be computed as of the date the disease becomes manifest. The administrative law judge found that decedent's condition became manifest on September 15, 1975, and that his average weekly wage at that time was $35.[2/]

2/ The administrative law judge originally awarded the "minimum compensation rate" of $74.57 per week for the period of total disability. He also awarded death benefits at the rate of $79.59 per week. The Director, Office of Workers' Compensation Programs (hereinafter, the Director), moved for reconsideration of the amount awarded for disability and death benefits arguing that the employee's actual average weekly wage of $35 should be the amount awarded under Sections 6(b)(2) and 9(e) of the Act. 33 U.S.C. [cont'd]

Claimant appeals contending first that the administrative law judge erred in computing the decedent's average weekly wage. Claimant additionally contends that compensation for either partial or total disability should have been awarded from the time that the decedent ceased work for the plumbing supply company sometime in 1966 or 1967 to September 15, 1975; and that the administrative law judge's award of attorney's fees is neither reasonable nor in accordance with law.

The employer contends that the decedent's average weekly wage should be based on the decedent's earnings at the

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§§906(b)(2) and 909(e). In a Supplemental Decision and Order dated August 29, 1978, the administrative law judge modified the amounts awarded for such benefits to $35 per week for each; the sum of $35 per week was the amount that decedent was receiving weekly from the Catholic parish at the time his disease became manifest.

date of his last injurious exposure to asbestos. Additionally, employer argues that, since in this case the last exposure was in 1945, minimum and maximum compensation rates in effect in 1945 should be applied.[3/] Finally, employer argues in the alternative that, should the Board reject the last injurious exposure test, the administrative law judge was correct in finding September 15, 1975, to be the date of the injury under the Board's holdings in Stark I and Stark II.

The issue of the appropriate definition of "the time of injury" for purposes of calculating average weekly wage under Section 10 in occupational disease cases is one of major importance in view of the constantly increasing

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3/ Since employer has not adequately briefed this particular issue, we will not consider it. See Shelton v. Washington Post Co., 7 BRBS 54 (1977).

number of occupational disease claims being filed under the Act. Particularly pervasive are cases like the instant one where claimants, who were exposed to asbestos in the shipbuilding industry during the years of World War II, are now suffering from asbestosis and other asbestos-related diseases and their frequently debilitating effects.

Recognizing the unusual importance, impact and complexity of the issue of computation of claimant's average weekly wage in occupational disease cases, and thus the need to consider the continued viability of the Stark holding, this Board, by Order dated June 3, 1980, invited briefs amicus curiae. More specifically, we delineated the issue as:

> In cases where the injury involves an occupational disease, when is the 'time of injury'? Is it when the employee is exposed to injurious stimuli; when the employee experiences symptoms

> caused by the occupational disease; when the employee sustains a loss in wage-earning capacity; when the employee is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between occupational disease and the employment; or some other time?

In response to the Board's invitation, a number of amici curiae submitted briefs arguing for and against the various options listed by the Board in its Order. Additionally, oral argument on the issue was heard by the Board in Seattle, Washington, on July 29, 1980.

Amici representing employers and carriers universally supported the date of last exposure to injurious stimuli as the "time of injury" under Section 10. Claimant and other amici supported the date of disability as the "time of injury" under Section 10. Only amicus proposed using the date of manifestation, and then only as an alternate date if the Board rejected the

date of disability argument.[4] The Director and one amicus suggested using either the date of manifestation or the date of last exposure, whichever occurs later. Nearly all participants raised objections to the date of manifestation rule previously adopted by the Board, although there was some confusion as to whether the date of manifestation was the date symptoms appeared, the date claimant became aware of the disease and its relationship to his employment, or the date the disease was first medically diagnosed. One amicus also proposed that the Board not make a definitive holding as to a date for "time of injury," but resolve the question on a case-by-case basis.[5]

4/ Brief for Amicus Curiae, Local No. 6 of the Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, filed July 2, 1980, p. 6.

5/ Id.

The issue before us is complex and no readily resolved. One of the problems is that the Act gives no guidance as to when an occupational disease occurs. A review of the provisions of the Act indicate that, in drafting the statute, Congressional attention was directed for the most part towards traumatic injuries -- those injuries in which the accident which produces harm is concrete and recognizable at the time it occurs, and in which the harm coincides with, or is followed shortly by, disability. See, e.g., Travelers Insurance Co. v. Cardillo, 225 F.2d 137 (2d Cir. 1955), cert. denied sub nom. Ira S. Bushey & Sons, Inc. v. Cardillo, 350 U.S. 913 (1955). The unique situation presented by occupational diseases does not fit neatly into the scheme drawn by Congress in the Act, since the harm and

disability do not always occur at the same time.

In occupational disease cases, a worker is exposed to injurious stimuli. This exposure may or may not continue for a significant length of time. Subsequently, and possibly after a latency period of years, the employee begins to suffer from the symptoms of the disease. At some point, the employee also becomes aware of the illness and becomes disabled by it. All of these events may occur in a variety of sequences. Exposure may continue up to and past the point at which an employee becomes disabled or aware of his disease. Symptoms may occur after diagnosis of the disease.

Moreover, the state of medical science is such that it is impossible to pinpoint a precise date that an occupational disease commences, i.e., the "time of injury". There are,

however, recognizable events, such as exposure, symptoms and diagnosis, which occur during the course of the occupationally-diseased worker's career. Any one of these events, then, might be selected and labeled as the "time of injury".

Additionally, the nature and severity of occupational diseases vary from one disease to another. For example, if we were to categorize occupational diseases simply according to latency periods, we would find at least three distinct types: those with virtually no, or comparatively short, latency periods; those with long latency periods; and those which become progressively worse with increased exposure.

Occupational diseases, which have virtually no or short latency periods, are similar to traumatic injuries in that the date of exposure, appearance of

symptoms, diagnosis and disability usually occur within the same employment time-frame.6/ These diseases present less of a problem than long-latency diseases with regard to a Section 10 "time of injury" definition. Solvents such as carbon tetrachloride and perchloroethylene, for example, cause acute hepatic and renal failure. C. Casarett and Doull, TOXICOLOGY p. 472 (2d ed. 1980).

Occupational diseases with long latency periods between first exposure

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6/ Organophosphorus insecticides can cause death by respiratory failure, and can also lead to heart block, ataxia (lack of muscular coordination), and disorders of the central nervous system. C. Casarett and Doull, TOXICOLOGY p. 367 (2d ed. 1980). Aspiration of hydrocarbon solvents, such as gasoline and kerosene, rapidly causes pneumonitis, pulmonary edema and hemorrhage. Casarett and Doull, supra, at 470. Benzene-induced aplastic anemia may appear in a few weeks (although in some cases it may not be discovered until after many years of exposure). M. M. Wintrobe, et al. CLINICAL HEMATOLOGY p. 1746 (7th ed. 1978).

and manifestation of the disease itself are wide-spread and present a serious problem. Pleural asbestosis may take up to 30 years to manifest itself where the worker has had only slight exposure. I. Selikoff and D. Lee, ASBESTOSIS AND DISEASE p. 205 (1978). Both pleural and parenchymal asbestosis appear to have latency periods which decrease as length of exposure increases. Selikoff, supra, at 177 and 205. Various forms of cancer are caused by occupational exposure to hazardous substances. At one point, the Occupational Safety and Health Administration recognized that there were over 500 "suspect carcinogens" in the workplace. Preamble to Final Rules on Identification, Classification and Regulation of Toxic Substances Posing a Potential Occupational Carcinogenic Risk, 45 Fed. Reg. 5029 (Jan. 22, 1980). The latency period for human carcinogenesis is generally five to

forty years. Id. With these diseases, unlike those with short latency periods, many years may intervene between date of exposure and the time symptoms first appear, the time of a diagnosis, and the time disability occurs; as stated earlier, these events may occur in any chronological order.

An occupational impairment which becomes progressively worse with increased exposure is hearing loss. Preamble to Rule on Occupational Noise Exposure; Hearing Conservation Amendment, 46 Fed. Reg. 4078 (Jan. 16, 1981). The degree of occupational hearing loss is largely dependent upon both the level of exposure and the length of exposure. W. Burns, NOISE AND MAN p. 220 (2d ed. 1973); U.S. Department of Labor, Occupational Safety and Health Administration, NOISE CONTROL 2 (1980). At first the employee will notice a temporary loss of hearing; if

exposure continues the loss will become permanent. Burns, supra at 215-216; NOISE CONTROL, supra at 2.

Compounding the problem of selecting an appropriate date is the fact that compensation for certain occupational diseases, such as hearing loss, must be determined under the schedule, 33 U.S.C. §8(c)(1-19); Pepco v. Director, U.S. , 101 S.Ct. 509 (1980), and does not require proof of a loss of wage-earning capacity, whereas in the case of diseases falling outside the schedule, 33 U.S.C. §8(c)(21), claimant must prove such loss.

Still another problem is the variety of contexts in which the term "injury" appears in the Act. Section 2(2) of the Act defines "injury" both in terms of accidental injury, i.e., trauma, as well as in terms of occupational disease or infection. Board case law has established that an

injury occurs where something unexpectedly goes wrong within the human frame. Johnson v. Brady-Hamilton Stevedore Co., 11 BRBS 427 (1979), citing Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968) and Southern Stevedoring Co. v. Henderson, 175 F.2d 863 (5th Cir. 1949). The Board has quoted with approval language defining "injury" as "'whatever lesion or change in any part of the system which produces harm or pain or a lessened facility of the natural use of any bodily activity or capability.' Furlong v. O'Hearne, 144 F. Supp. 266, 270 (D. Md. 1956)." Gardner v. Bath Iron Works Corp., 11 BRBS 556 (1979), aff'd sub nom. Gardner v. Director, OWCP, Nos. 80-1021 and 80-1085 (1st Cir. Feb. 11, 1981).

The word "injury" itself is used many times throughout the Act in relation to many different concepts. It is a key term in defining "disability"

under Section 2(10), 33 U.S.C. §902(10). Employer's knowledge of "injury" may excuse failure to file notice under Section 12(d), and may delay the running of the statute of limitations under Section 30(f). 33 U.S.C. §§912(d) and 930(f). Knowledge of an injury also triggers an employer's responsibility to pay compensation or to file a notice of controversion under Section 14. 33 U.S.C. §914. Whether or not the provisions of Section 8(f), 33 U.S.C. §908(f), might apply to reduce employer's liability depends upon a pre-existing condition combining with an "injury" so as to result in increased disability.

The concept of the "time of injury" specifically occurs in several instances under the Act. "Time of injury" is a crucial concept in the definition of "wages" under Section 2(13). 33 U.S.C. §902(13). It establishes the date upon

which average weekly wage is to be calculated under Section 10 of the Act. 33 U.S.C. §910. For determining average weekly wage under Section 10, the "time of injury" has been held to be the date of manifestation. Stark I and Stark II. "Time of injury" and the awareness of the relationship of the injury to the employment begins the running of the notice and statute of limitation periods under Sections 12(a) and 13(a). 33 U.S.C. §§912(a) and 913(a). In defining "time of injury" for purposes of Section 12 notice of injury to the employer, Board cases under the pre-1972 Act also focused on the time at which claimant became aware, or should have become aware, of the relationship between his injury and his employment. Stark v. Lockheed Shipbuilding Co., 5 BRBS 186 (1976); Januszicwicz v. Sun Shipbuilding & Dry Dock Co., 9 BRBS 170 (1978); Moore v. Paycor, Inc., 11 BRBS

483 (1979).[7] The "time of injury", under Section 13 for the running of the statute of limitations in occupational disease and latent injury cases under the pre-1972 Act, had been held to be the date on which the claimant is correctly informed by a doctor or a competent professional diagnostician of the relationship between his work and disability, Stark v. Lockheed, supra, unless there was other evidence that claimant was aware or should have been aware at an earlier date. Sicker v.

7/ Prior to 1972, Section 12(a) did not contain the awareness language it read as follows:

> (a) Notice of injury or death in respect of which compensation is payable under this chapter shall be given within thirty days after the date of such injury or death . . .

Muni Marine Co., 8 BRBS 268 (1978) (a loss of hearing).[8/]

In examining the possible different meanings of "time of injury," as well as the different statutory concepts attached to the word "injury," we have noted the rule of statutory construction that a statute is to be interpreted as a whole. See Sands, 2A Sutherland Statutory Construction, §46.05 (1978). A natural corollary to this rule is that, when the same term is used in several sections of a statute, it should be interpreted in the same manner. This corollary, of course, must yield before

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8/ Prior to the 1972 Act, Section 13(a) also did not contain the "awareness" language; it read as follows:

> (a) The right to compensation for disability under this chapter shall be barred, unless a claim therefor is filed within one year after the injury . . . .

33 U.S.C. §913(a).

the purpose behind the law at issue and cannot be inflexible. The Supreme Court itself has noted that:

> Most words have different shades of meaning, and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section. Undoubtedly, there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning. Courtauld v. Legh, L. R., 4 Exch. 126, 130. But the presumption is not rigid and readily yields whenever there is such a variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.

Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433, 52 S.Ct. 607, 608-609 (1932) (emphasis added). See Bituminous Coal Operators' Association, Inc. v. Hathaway, 406 F. Supp. 371 (W.D. Va. 1975) aff'd, 547 F.2d 240 (4th Cir. 1977).

We conclude that there is such a "variation in the connection" of the ways in which "injury" and especially "time of injury" are used in the Act[9/] that application of a single definition of "time of injury" would denigrate the purpose behind some of the provisions of the Act. The statute at issue, the Longshoremen's and Harbor Workers' Compensation Act, is an integrated workers' compensation scheme. The various sections thereof were obviously intended by Congress to implement the various concepts of workers'

9/ The different intents referred to in Atlantic Cleaners & Dyers were Congressional intent (1) to regulate commerce between the states, and (2) to prohibit certain acts under its plenary power to legislate for the District of Columbia. While the distinction between the purposes behind the different sections is not necessarily the same as that involved in Atlantic Cleaners & Dyers, it is an equally valid justification for giving different interpretations to the same word as it appears in different parts of the statute.

compensation which must be applied to each case. It is clear, for example, that the considerations which led to the adoption of the "manifestation" rule in Section 13(a) cases are not applicable to Section 10. It is obvious that Section 13(a), as are all statutes of limitations, was intended by Congress to encourage prompt filing of claims and to protect employers from stale claims. See, e.g., Insurance Co. of North America v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1220 (6th Cir. 1980). In traumatic injury cases, where the accident, harm and disability occur about the same time, there is no problem in fixing a time of injury. With occupational disease cases, the question of when injury occurs has to be related to the purpose Section 13(a) was designed to serve; thus, the Courts determined that the time of filing could not begin to run until claimant had

reason to know that he had an employment-related injury. Cardillo, 225 F.2d at 143. This rule effectuated the Congressional purpose behind Section 13(a) without undue harshness to claimants.

The same considerations are not applicable to defining time of injury under Section 10, which deals with determining an equitable amount of benefits after a claim has been timely filed. Thus, rather than relying upon definitions for "time of injury" under any other section of the Act, we must look at all possible definitions for "time of injury" under Section 10. Our intent is to set a date for "time of injury" under Section 10 which best effectuates Congressional purpose, which best comports with the language of the Act, which fairly balances competing interests of claimants, employers and carriers, and which best accommodates

the variety of occupational disease claims covered by the Act.

We have determined that one definition for "time of injury" under Section 10 must be chosen. We decline to follow the case by case approach suggested by one amicus or the alternate date approach suggested by another amicus and the Director for two reasons: first, the issue is squarely presented as an important question of law, which the Board is bound by law to determine, 33 U.S.C. §921(b)(3); second, neither approach will provide parties and adjudicators with the judicial certainty necessary in occupational disease cases.

Three major alternative definitions were argued before the Board: date of manifestation, date of disability and date of last exposure; each has its advantages and disadvantages.

1. Date of Manifestation

The date of manifestation as the "time of injury" for Section 10 has previously been adopted by the Board in Stark I and Stark II. In Stark I and Stark II, we defined "time of injury" as the date when the disease becomes manifest,[10/] specifically rejecting the administrative law judge's use of the date of last exposure. In Stark I, we gave two reasons for adopting this rule: first, that in many occupational disease cases claimants would suffer a diminution in compensation rate due to inflation occurring during the time lag between last exposure and onset of

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10/ In Stark II, the Board quoted with approval language from Urie v. Thompson, 337 U.S. 163, 170 (1949), wherein the court quoted with approval language from a state workers' compensation case: "'[T]he afflicted employee can be held to be "injured" only when the accumulated effects of the deleterious substance manifest themselves . . . .' [Footnote omitted.]."

disability; and second, date of manifestation was consonant with Board and court case law under the pre-1972 Act holding that, for purposes of Section 13(a), injury occurs at the time the disease becomes manifest, i.e., when claimant becomes aware of his disease and its relationship to his employment.[11/]

11/ See, e.g., Cardillo, supra. Section 13(a) was amended in 1972. (Text of unamended version appears in footnote 8, supra.) The pertinent part of the amendment codified pre-1972 Act case law to toll the statute of limitations until the employer is aware or should have been aware of the relationship between his injury and his employment:

> The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment.

33 U.S.C. §913(a).

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The Board's decisions in Stark I and Stark II do not specifically define "manifestation." "Manifestation" may be interpreted to mean when the claimant becomes "aware." Awareness, with the further refinement (adopted from Sections 12 and 13) that the claimant must be aware of the relationship between his illness and his employment, has been the standard applied by the Board subsequent to its decision in

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Bethlehem Steel, in its amicus brief, argued that "time of injury" under Section 13(a) is, and has always been, date of last exposure. Pre-1972 case law refutes this argument. See Cardillo, supra. It could be argued, however, that the meaning of "injury" under amended Section 13(a) has been changed by the new language, which keys the time for filing a claim to the employee's awareness of the relationship between the injury and the employment. Because we do not feel that the Section 10 "time of injury" is necessarily the same as that of Section 13(a), we need not consider this argument. For a discussion of the effect of the 1972 amendments of Section 13(a) with relation to Section 10, see infra.

Stark II. See Ward v. General Dynamics Corp., 9 BRBS 569 (1978); Keeler v. General Dynamics Corp., 7 BRBS 989 (1978). In each of these cases, the "time of injury" for Section 10 was the time at which the claimant was diagnosed as suffering from asbestosis. Alternatively, however, "manifestation" may mean the onset of symptoms, as the Stark II quotation from Urie would seem to indicate.

Awareness through diagnosis is an attractive alternative because the date of diagnosis is readily ascertainable. Thus, there would be less cause for litigation on this issue. Awareness through diagnosis is also consistent with Stark I and Stark II because the occupational disease may only be manifest when the employee is aware of the existence of the disease and its relationship to the employment, which often does not occur until the employee

is correctly diagnosed. The date of diagnosis has been proposed as a viable date inasmuch as it is consistent with the filing requirement of Sections 12 and 13 of the Act. See Bath Iron Works v. Galen, 605 F.2d 583, 10 BRBS 863 (1st Cir. 1979); Januszíewicz v. Sun Shipbuilding & Dry Dock Co., supra; Shoemaker v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 141 (1980); Stark v. Lockheed, supra. Thus, awareness of the injury and the filing of the claim coincide -- and claimant may well expect that his loss of wage-earning capacity will be determined within the same time frame.

The major drawback to date of diagnosis is that the diagnosis may be made when a claimant is asymptomatic and before there is a loss of wage-earning capacity, or that claimant may not be entitled to compensation, or his average weekly wage may be too low to fairly

compensate him for later loss of wage-earning capacity. Diagnosis may also not be made until after a claimant has voluntarily removed himself from the job market, or after a claimant has ceased work due to physical difficulties which, at the time he ceases work, are of unknown etiology. Using the date of diagnosis may also result in disparate treatment of two claimants who have the same exposure, same wages, same employment history, and the same disability: the claimant with the more experienced and competent doctor may be diagnosed at an earlier point when he is earning a lesser wage. The absence of a diagnosis may encourage a claimant, who is not sufficiently informed, to continue working and be subjected to further harmful exposure.

Awareness may also occur without, or may precede, a diagnosis as, for example, where claimant realizes his

hearing ability has diminished and attributes this diminution to noise in the workplace. Thus, the date of awareness would be the date the claimant was aware of his hearing impairment or the date that with reasonable diligence he should have been aware. Such a date, unlike date of diagnosis, is unclear and not susceptible to uncontroverted proof.

Onset of symptoms as the sole explanation of manifestation was not argued by any participants, although it was recognized that the appearance of symptoms might be the earliest manifestation of the disease. The major advantage of this date is that it correlates well with case law defining injury as "whatever lesion or change in any part of the system which produces harm or pain..." Furlong v. O'Hearne, 144 F. Supp. 266, 270 (D. Md. 1956), aff'd, 240 F.2d 958 (4th Cir. 1957) (per curiam); Gardner v. Bath Iron Works

Corp., 11 BRBS 556 (1979), aff'd sub nom., Gardner v. Director, OWCP, Nos. 80-1021 and 80-1085 (1st Cir. Feb. 11, 1981).

Problems with defining "time of injury" in Section 10 as the appearance of symptoms were, however, noted by many participants. It was pointed out that fact finders would have to speculate as to whether particular symptoms, such as shortness of breath, which occurred earlier, were the onset of an occupational pulmonary disease or another non-employment health problem. Furthermore, a claimant may suffer from symptoms without recognizing that they are indicative of a particular disease or are related to a particular employment in the past. Moreover, although the appearance of symptoms sometimes is the first indication to claimant that a health problem exists, it is merely fortuitous when symptoms

coincide with a loss in wage-earning capacity.

Regardless of which of the three foregoing definitions is applied, there are problems with use of the date of manifestation. In cases where the disease has a long latency period, the date of manifestation frequently bears no relationship to the employment exposure which caused the disease, since the employee will often have left that employment prior to the date of manifestation. In such cases, employer would be paying compensation computed from a wage (perhaps a much higher one) other than that it actually paid to the employee. This places a tremendous burden on both employers and carriers, since it is impossible to predict accurately the amount of liability or to fix insurance premiums based on unknown future wage levels. Cardillo, supra, held that the insurer covering the risk

at the time of last exposure is liable for payment of benefits. Where the contract of insurance limits carrier liability to injuries occurring during the policy period, moreover, and the policy period and last exposure end prior to date of manifestation, there may be no carrier liable to pay compensation.

We have considered the various alternative suggestions, and we reject for Section 10 purposes the date of manifestation - whether that date be the date of onset of symptoms, awareness of the disease and its relationship to the employment, or the date of diagnosis.12/

12/ While only two amici expressed support for date of manifestation as an alternate date (Local 802 at Sun Ship, Inc., and Local No. 6 of Industrial Union of Marine and Shipbuilding Workers of America), nearly all amici, as well as employer in the instant case, attacked the problems caused by this definition. Arguing against date of manifestation were: Todd Shipyards [cont'd]

We overrule the Section 10 holding in Stark I and Stark II[13/] because, inter alia it was based on the mistaken belief that case law under Sections 12(a) and 13(a) of the Act is applicable to the computation of loss of wage-earning capacity under Section 10. The purposes behind Sections 12 and 13 are completely different from those behind Section 10; therefore a uniform definition for "time of injury" is not

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Corporation, employer in this case; and amici curiae Shipbuilders Council of America, Robert R. Hatten, Stephen C. Embry, Local No. 6 of Industrial Union of Marine and Shipbuilding Workers of America, Alliance of American Insurers and the National Association of Independent Insurers, Bethlehem Steel Corporation, and Kathryn E. Ringgold.

13/ It follows, therefore, that we also overrule that portion of any decision which relies on the Stark I and Stark II holding that "time of injury" is "date of manifestation" for purposes of Section 10(a). This includes, inter alia, Keeler v. General Dynamics Corp., 7 BRBS 989 (1978) and Ward v. General Dynamics Corp., 9 BRBS 569 (1978).

required. Nor, we are now convinced, is it desirable. Further, although the problem of inflation is a valid consideration, and indeed a good argument in favor of using the date of manifestation as the time of injury, it is only one of many variables which must be considered. Once all these variables are considered, it becomes apparent that the date of manifestation is not the best definition for "time of injury" under Section 10.

It is most persuasive that Congress did not amend Section 10 in 1972 when it amended Sections 12(a) and 13(a) to extend the time limitations for, respectively, notice to employer and filing of a claim. In both Sections 12(a) and 13(a), the limitation period had originally commenced from the "time of injury"; the 1972 amendment added language which delays the running of the limitation periods until the employee or

beneficiary is aware of the relationship between the injury or death and his employment. No such change was made in Section 10, which strongly suggests that, while "awareness" was to be used under Sections 12 and 13, Congress considered it an inappropriate concept in Section 10.

There are also serious policy considerations for rejecting the date of manifestation. Since it is not always a readily ascertainable date, it will encourage the contest of claims and result in increased litigation for resolution of claims. Moreover, it does not compensate employees who continue to work for the full effects of their loss of wage-earning capacity, since the date of manifestation has no relevance to time of disability. Under this date, more than under any other date, it is likely that claimants who suffer from occupational diseases with long latency

periods, will either have no wages or their wages will have been substantially decreased when the disease finally manifests itself. For employers, the date of manifestation would require that they maintain insurance coverage for years after employees leave their employ. In instances where exposure was some years ago and has ceased, liability is difficult to predict and coverage may be unobtainable. Indeed, the complexities and uncertainties caused by a date of manifestation approach may well drive carriers from the field. Additionally, employers would be compelled to compensate employees based on higher wages for skills learned after the employment relationship has been terminated.

The amended Act involved a compromise between shipowners and stevedore-employers whereby the unseaworthiness cause of action against

the shipowner, and the indemnity action against the stevedore, were eliminated in order to ensure adequate funds for increased workers' compensation benefits. It has been concluded that the overriding purpose of the 1972 amendments was to strictly limit the liability of the employer in order to husband its resources for increased benefits under the Act. Cella v. Partenreederei MS Ravenna, 529 F.2d 15 (1st Cir. 1975), cert. denied, 425 U.S. 975 (1976). Use of the date of manifestation definition would defeat the accomplishment of these objectives, and accordingly we are compelled to reject it. See Smither & Co., Inc. v. Coles, 242 F.2d 220 (D.C. Cir. 1957), cert. denied, 354 U.S. 914 (1957).

2. Date of Disability

We have carefully considered the viability of using the date of disability as the "time of injury" under

Section 10.[14/] In support of using the date of disability for computing average weekly wage is the consideration that this date accommodates the fundamental purpose of the workers' compensation statute, namely, to compensate an injured worker for his loss of wage-earning capacity at such time as his right to compensation arises. See generally Devillier v. National Steel & Shipbuilding Co., 10 BRBS 649 (1979). We note the further consideration that, although employees may be exposed to injurious stimuli, experience symptoms, and even have a medical diagnosis of occupational disease, there is no "injury" compensable under the Act until

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14/ Amici proposing this approach were Robert R. Hatten, Esq., of Patten & Wornom; Stephen C. Embry, Esq., of O'Brien, Shafner, Bartinik, Stuart & Kelly; Local No. 6 of the Industrial Union of Marine and Shipbuilding Workers of America; AFL-CIO; and Kathryn E. Ringgold, Esq., of Airola & Ringgold.

employees are unable, or have reduced capacity, to perform their usual work. Moreover, since the employer is responsible for the disabling effects of the harm he caused, see generally 1 Larson, Workmen's Compensation Law §2 (1978), earning capacity at the time of disability may be the most relevant factor in determining average weekly wage. We note also that, by using date of disability, claimants would be permitted to benefit from wage increases up to the time of disability. Finally, one consequence of using date of disability is some equalization of treatment of traumatically injured claimants and claimants disabled by occupational disease: since in traumatic injury cases injury and disability generally coincide, the average weekly wage at time of injury is also the average weekly wage at date of disability; thus, equating "time of

injury" with date of disability in occupational disease cases gives a similar result, as to compensation, to that which occurs in traumatic injury cases.

On the other hand, militating against the use of date of disability as the time of injury is the argument that Congress never intended, legislatively, to equate time of injury with date of disability.[15/] See discussion, infra. In this regard, it is also pointed out that the terms "injury" and "disability" are separately defined in the Act, 33 U.S.C. §§902(2), 902(10). Additionally, since many occupational diseases have long latency periods, disability may come at a time when the employee has voluntarily withdrawn from the job market, and, consequently, has no

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15/ Amicus Curiae Brief of Bethlehem Steel Corporation, filed July 1, 1980.

average weekly wage as of the date of disability upon which a loss of wage-earning capacity can be based. Yet the harm suffered is clearly employment-bred. Furthermore, in cases where disability is progressive, such as in hearing loss cases, the date of disability is difficult to establish because the severity of the impairment increases and progressively becomes permanent.

Mindful of all of the foregoing considerations, we have concluded that equating date of disability with "time of injury" is prohibited under the Longshore Act. We therefore reject such an interpretation. The legislative history behind the 1927 Longshore Act is persuasive on this point. The New York Workmen's Compensation Statute, upon which Congress based the Longshore Act, contained langauge that "[t]he disablement of an employee resulting

from an occupational disease... shall be treated as the happening of an accident within the meaning of this chapter...." N.Y. Work. Comp. Law, §37 (McKinney). In drafting the Longshore Act, Congress specifically considered language which would have equated injury with disability. In bills introduced in both houses, injury was defined to include "[a] disease arising out of employment, and disablement from such disease shall be treated as the happening of an accident." S. 3170, 69th Cong., 1st Sess. §2(2) (1926); H.R. 9498, 69th Cong., 1st Sess. §2(2) (1926). (emphasis added). Additionally, Section 8, predecessor to Section 10, stated in its introductory language that average weekly wage should be calculated as of the time of the injury; however, its subsections referred to the time of the accident. Id. §8. None of this language appeared in the law as

enacted.[16] Our review of the legislative history of the 1927 Act evinces no reason for the deletion of the "disablement" language. We know only that the change occurred prior to the time that the bill emerged from the Senate Judiciary Committee. See S.Rep. No. 973, 69th Cong., 1st Sess. (1926). This bill was then passed by the full Senate, 67 CONG. REC. 10614 (1926), and sent to the House. We know that the language was not reinstated by the

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16/ We note, however, that the language which is cited in the amicus brief of Bethlehem Steel Corporation in support of the contention that "[i]t is a well established canon of statutory construction, that 'where Congress has advertently changed the legislative language the change must be given effect.' United States v. Guthrie, 387 F.2d 569, 571 (4th Cir. 1967), cert. denied, 392 U.S. 927, quoted in United States v. Robbins, 613 F.2d 688, 691 (8th Cir. 1979)," has been taken out of context. In both of these cases the courts were referring to an enacted amendment which expressly changed prior statutory language. In the instant case, we have no such amendment with regard to the issue at hand.

House, as it does not appear in the Act as enacted. In light of the foregoing history, we can only conclude that Congress rejected the view that "time of injury," in Section 10's predecessor, is date of disability.

Furthermore, as noted above, the terms "injury" and "disability" are separately defined in the Act, 33 U.S.C. §§902(2), 902(10), which suggests that, had Congress intended for a claimant's average weekly wage to be computed as of the date of disability, it would have used that specific language, at least for cases involving occupational disease, rather than "time of injury." Moreover, the Supreme Court expressly rejected equating the terms "injury" and "disability" for statute of limitations purposes in Pillsbury v. United Engineering Co., 342 U.S. 197 (1952). It is true that the Court specifically noted that it was not dealing with

latent injuries or occupational diseases. 342 U.S. at 199. Nevertheless, the Court's discussion with regard to Congress' distinction between the two terms appears to apply equally to occupational disease cases. And, it has been held in a case involving occupational disease that the terms "injury" and "disability" are not interchangeable. Aerojet-General Shipyards, Inc. v. O'Keeffe, 413 F.2d 793 (5th Cir. 1969).

In rejecting date of disability as the "time of injury," we are also mindful that, in 1972, when Congress amended certain sections of the Act, it did not see fit to amend Section 10. At that time, had disability been a concept Congress wished to incorporate into average weekly wage determinations, it could have done so, as it had done several years before, in 1960, with the FECA monthly pay provisions. Under the

1960 amendments to Federal Employees Compensation Act, compensation is computed on the basis of monthly pay, which is defined as the pay at the time of injury, or at the time disability begins, or at the time compensable disability recurs, whichever is greater. 5 U.S.C. §8101(4). Thus, under FECA, Congress specifically provided that computation of benefits may be based on the pay rate at time of disability. This approach was not followed in Section 10 of the Longshore Act.

Thus, while meritorious arguments may be raised that, in occupational disease cases, the date of disability should be the time of injury in furtherance of the policy objectives of the Act, we are nevertheless unable to legislate such a result. This Board, as an appellate judicial tribunal, has no authority to do by interpretation what Congress chose not to do by legislation.

See 33 U.S.C. §921(b)(3); see also U.S. v. Rutherford, 442 U.S. 544 (1979); National Broiler Marketing Ass'n v. U.S., 436 U.S. 816 (1978); Kicklighter v. Ceres Terminal, Inc., 13 BRBS 109 (1981).

3. Date of Last Exposure.

The only definition of "time of injury" which remains to be considered is the date of last exposure, i.e., the time at which the claimant is last exposed to the injurious stimuli causing his disease.[17/] The date of last exposure is advantageous in that it is generally a fixed date susceptible of objective proof. Advocates of this

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17/ Arguing in favor of this definition are Todd Shipyards Corporation, employer in the instant case; and amici curiae The Shipbuilders Council of America, General Dynamics Corporation, Bethlehem Steel Corporation, Alabama Dry Dock & Shipbuilding Company, Local 802 at Sun Ship, Inc., and Ingalls Shipbuilding Division, Litton Systems, Inc. Opponents of this definition are claimant and amicus Stephen L. Embry.

definition point out that coverage under the Act is dependent upon exposure to injurious stimuli in maritime employment and on navigable waters, and that only the date of last exposure assures that benefits are based on the wages received in the covered employment. Moreover, since an occupational disease is compensable only if it arises out of and occurs in the course of such employment, 33 U.S.C. §§902(2) and 903(a), the time of injury for determining loss of wage-earning capacity can be causally related to the employment only if it is the date on which the claimant was last subjected to the cause of the disease. Last exposure, additionally, is the basis for determining liability for compensation; it is well established that the employer who last exposed claimant to the toxic substance and its carrier during the last period of exposure are liable for all benefits. Cardillo, supra.

Insurance coverage also is dependent on time of exposure. Since calculation of carrier liability, and hence employer's premiums, are normally based upon the wages being paid to employees during the year in which the employer might become liable for compensation, some policies preclude recovery for injuries occurring outside of the policy period or more than five years after the period. The "exposure rule" has the additional advantage of protecting those employees who by the date of symptoms, disability, or awareness are no longer active in the labor market. These employees have little or no income upon which to base an average weekly wage determination. The last injurious exposure rule would ensure that average weekly wage is calculated at least at a time when these employees had an income.

The precise objections to the use of the date of last exposure for

determination of loss of wage-earning capacity are: that in cases of diseases with long latency periods, exposure has no relationship to wage-earning capacity; that there is no right to compensation at the time of exposure; that date of last exposure arbitrarily differentiates between two employees who become disabled at the same time but whose exposure did not coincide; and that it subjects employees to the effects of our inflationary economy with the result that some workers will be compensated in the 1980's at 1940 wage rates.

After much deliberation, we have concluded that the date of last exposure, despite its drawbacks, is the best definition for "time of injury" under Section 10. If we had the power to restructure the workers' compensation system as it now exists and to revise the Act as it is now written to better

accommodate occupational disease cases, we would do so and, in doing so, might very well select a different date. We do not, however, have such power; that power is reserved for Congress. See 33 U.S.C. §921(b)(3) and cases cited supra. We must, therefore, deal with the world as it is. And in our world as it is, i.e., the Longshore Act, we have no alternative but to hold that the date of last exposure is the "time of injury" under Section 10.

There are many reasons why the date of last exposure is the best possible definition for purposes of Section 10. It is a date capable of objective proof and about which there is generally little dispute between parties. Thus, there will be less likelihood of litigation under this definition than under other approaches. Even in cases where the date of diagnosis is objectively proven, there may be

disagreement as to whether the claimant may have been aware, and thus the disease manifest, at a prior date. Additionally, in occupational disease cases, it is the exposure to the hazardous substance which causes the injury. With asbestosis, for example, it is the settling of the asbestos fibers within the lung tissue which produces pathological changes in lung tissue. See Selikoff, supra; see generally Forty-Eight Insulations, Inc., supra. If exposure ceases, so does the cause of the harm, although the pathological changes will, in the natural progression of the disease, continue and worsen.

The rule is not that inequitable to employees from a financial standpoint. Employees who continue to work and to be exposed up to the time of disability will be compensated for loss of wage-earning capacity based on earnings at

that time. Employees who voluntarily remove themselves either completely or partially from the job market, will have wages upon which to base a determination as to loss of wage-earning capacity.

The effects of inflation in reducing the current value of past wage levels was the prime consideration in our choice of the date of manifestation in Stark I and Stark II (now overruled, supra). However, upon further reflection we conclude that Congress provided a legislative solution for this problem in Section 10 of the Act. Section 10(h)(1), 33 U.S.C. §910(h)(1), provides for an initial, upward adjustment to compensation in claims where permanent total disability or death occurred prior to the enactment of the 1972 amendments, and provides for annual adjustments of compensation in such claims puruant to Section 10(h)(3), 33 U.S.C. §910(h)(3). We have

previously held that Section 10(h) is also applicable to claims in which the injury occurs prior to the enactment of the 1972 amendments, but total disability or death does not occur until afterwards. Silberstein v. Service Printing Co., Inc., 2 BRBS 143 (1975); Hernandez v. Base Billeting Fund, Laughlin Air Force Base, 13 BRBS 214 (1980), aff'd on reconsideration 13 BRBS 220 (1981). In addition, with regard to post-amendment injuries, Section 10(f) provides for annual adjustments according to the percentage increase of the national average weekly wage. It is our view that these adjustments legislatively resolve the problem of the inflationary devaluation of wages earned in years prior to disability. If these adjustments are properly applied, use of date of last exposure does not seem

unfair to claimants.[18/] We further note that selection of the date of last exposure for purposes of Section 10 does not in any way affect the amount of medical benefits the employee may properly receive. See 30 U.S.C. §907(a) and (g); 20 C.F.R. §702.401 et seq.

Further, employers do not have any increased burden for pre-amendment injuries, since Section 10(h)(2) provides that the special fund is to pay fifty percent, and general appropriations fifty percent, of all upward adjustments under Sections 10(h)(1) and 10(h)(3). 33 U.S.C. §910(h)(2). Annual adjustments arising out of post-amendment injuries are paid by the employer/carrier. 33 U.S.C. §910(f). However, where the special

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18/ Amicus Bethlehem Steel Corp. also pointed out, at Oral Argument, that widows have the benefit of the minimum death benefit provision of 33 U.S.C. §909(e).

fund is liable for compensation under Section 8(f), it is also liable for the adjustments under Section 10. Spencer v. Bethlehem Steel Corp., 7 BRBS 675 (1978).

Coverage under the Act is dependent upon the injury occurring upon navigable waters. 33 U.S.C. §903(a). If a date other than last exposure is used to define "time of injury," some employees will be compensated for loss of wages earned in non-covered employment, obviously an undesirable result.

Under a last exposure rule the problems of predicting eventual liability for claims due to occupational disease are lessened. Expected liability can be based on the wages in effect at the time of last exposure; thus employers and and insurers will not have to indulge in the risky business of predicting the future wage levels at time of manifestation or disability.

Insurance rates are more easily computed. The insurer covering the risk at the time of last expsoure, if it is also the time of injury, will be liable both legally, Cardillo, supra, and contractually no matter when manifestation or disability occurs. See also Forty-Eight Insulation, Inc., supra. Under Cardillo, supra, the employer and insurer covering the risk at the time of last exposure are liable for payment of compensation.[19/] It is

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19/ Cardillo, supra, predicated employer and carrier liability on

> ...the last employment in which the claimant was exposed to injurious stimuli prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment.

Cardillo, 225 F.2d at 145. Although Cardillo specifically stated that the determinative date was last exposure prior to claimant awareness of the disease, and some of the Cardillo claimants continued to receive exposure [cont'd]

most reasonable that the date which determines who is liable coincide with the date which helps determine the amount of liability. Closely related to this consideration is employer's amicus argument based on Section 2(13) of the Act, which defines "wages" as "...the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury..." 33 U.S.C. §2(13). Under the Act, wages are paid pursuant to the "contract of hiring" in force at the "time of injury." In many occupational disease cases, the claimant ceases to

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subsequent to their awareness, there is no indication in the Cardillo case that there were different employers or carriers subsequent to the time claimant became aware of their hearing losses. Thus, there is no apparent factual reason behind the language limiting the "last exposure" rule to "last exposure prior to awareness." Nor is there any need for such a limitation in the instant case.

work with the employer in whose employment he was last exposed prior to the time he becomes disabled or his disease becomes manifest. In such case, if "time of injury" is defined as anything other than last exposure, amici argue that there are no wages as defined in the Act because there is no "contract of hire" between the responsible employer and the claimant. This argument is persuasive because, unlike Sections 12 and 13, the definition of "wages" and the determination of average weekly wage under Section 10 are inextricably linked. Thus, the definitions of "time of injury" under both Section 2(13) and 10 should, insofar as possible, be the same, in order to effectuate the purpose of the Act. Consequently, "time of injury" under both sections has to occur while there is a contract of hire in force

between the liable employer and the employee.

The major argument advanced against using date of last exposure is that claimants disabled on the same date will be compensated at different rates. We do not find this argument persuasive. Any definition applied to Section 10 "time of injury" is problematic in terms of equal treatment of claimants. It is impossible to choose a definition which will ensure that every occupationally diseased employee will be treated the same as every traumatically injured claimant. It is true that, under the date of last exposure definition, a claimant who suffers a disabling traumatic injury in 1975 will be compensated on the basis of his 1975 wages, whereas a claimant who also becomes disabled in 1975, but from an occupational disease due to exposure which ended in 1948, will be compensated

on the basis of his 1948 wage rate. In most cases, the 1948 rate will be the lower rate. Other definitions, however, pose similar problems in different factual settings. Under a disability definition, for example, claimants whose injuries are caused at the same time, but who do not become disabled on the same date, are treated disparately: a claimant who suffers a disabling traumatic injury in 1945, and a claimant who was last exposed in 1945, but does not become disabled until 1970, would each have different compensation rates, despite the fact that both were injured and disabled due to employment-related causes occurring at the same time.

In the final analysis, then, there is no universally equitable solution to this problem, given the current scheme of workers' compensation under the Act. Our choice of date of last exposure is the result of a balance of policy

considerations, and, above all, is mandated by the purpose and plan of the Act itself. This purpose was eloquently stated by Chief Justice Burger who, when he served on the District of Columbia Court of Appeals, stated that the Act's workers' compensation scheme:

> ...emerged from a balancing of the sacrifices and gains of both employees and employers, in which the former relinquished whatever rights they had at common law in exchange for a sure recovery under the compensation statutes, while the employers on their part, in accepting a definite and exclusive liability, assumed an added cost of operation which in time could be actuarially measured and accurately predicted; incident to this both parties realized a saving in the form of reduced hazards and costs of litigation. As stated by Mr. Justice Brandeis in Bradford Electric Co. v. Clapper, 1932, 286 U.S. 145, 159, 52 S.Ct. 571, 576, 76 L.Ed. 1026, the purpose of these laws was to provide "not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinative." Thus,

> anything that tends to erode the exclusiveness of either the liability or the recovery strikes at the very foundation of statutory schemes of this kind, now universally accepted and acknowledged.

Smither and Company, Inc. v. Coles, 242 F.2d 220, 222 (D.C. Cir. 1957) cert. denied, 354 U.S. 914 (1957). (Footnote omitted.) Adoption of a definition other than date of exposure for the purpose of Section 10 would both erode the exclusiveness of liability and strike at the foundation of the Congressional scheme of the Longshore Act. Accordingly, we have no choice but to hold that, as a matter of law, "time of injury" under Section 10 is the date that the employee is exposed to the injurious substance which causes his disease.

Because we have determined that the "time of injury" for the purpose of Section 10 is the date of last exposure, there is no need to address claimant's

arguments contesting the use of the $35 per week figure received by the decedent from the Catholic parish.[20] Claimant, however, also argues that the administrative law judge erred in his determination that onset of disability commenced in 1975, rather than when the decedent ceased work for the plumbing company in the 1960's. The administrative law judge appears to base his finding upon two medical reports. The first, dated January 1, 1974, is from Dr. Robert Calhoun and states that Mr. Dunn had no chest or lung problems at the time of that report. The second was made upon the decedent's admission to the hospital on September 15, 1975,

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20/ Claimant argues that the $35 per week the decedent received from the Catholic parish was not wages but was charity; that the administrative law judge should have used the wages from decedent's last fulltime employment to determine average weekly wage; and that, in the alternative, the national average weekly wage should be used to compute claimant's compensation.

at which time a diagnosis of severe obstructive airway disease and possible malignancy of the left lung was made. The administrative law judge appears to focus upon Dr. Calhoun's 1974 report in concluding that claimant did not become disabled until 1975. Although this report does state that the doctor found no chest or lung problems in 1974, it may not be considered in isolation. There are two medical reports dated 1960, which indicate that Mr. Dunn had lung problems at that time. Claimant testified that her husband had breathing problems when he left the plumbing supply company job. Dr. Narodicks's testimony could also support a finding of an earlier date of disability. There is also evidence in the record that the decedent had for some years suffered from a number of medical problems in addition to pulmonary ailments. None of this evidence was considered by the

administrative law judge. The administrative law judge, however, must consider all this evidence in order to determine the date on which disability commenced. We therefore remand this issue to the administrative law judge to reconsider whether the decedent's inability to work as a plumbing supply salesman was due in whole or in part to his asbestosis. Should the administrative law judge find that Mr. Dunn was indeed disabled at an earlier date he must also consider the extent to which the decedent has suffered a loss of wage-earning capacity under Sections 8(c)(21) and 8(h) of the Act. 33 U.S.C. §§908(c)(21) and 908(h).

Claimant has also appealed the administrative law judge's reduction of the attorney's fee from the requested amount of $3,500 to $1,500. The administrative law judge made this substantial reduction without

explanation, which makes it necessary for us to vacate and remand the fee award. Bednarek v. I.T.O. Corp. of Baltimore, 7 BRBS 708 (1978); Beacham v. Atlantic & Gulf Stevedores, Inc., 7 BRBS 940 (1978).

We also note that the attorney's fee application in this case does not comply with the applicable regulation, 20 C.F.R. §702.132, which requires the fee application to state with particularity the character of the necessary work done and the hours devoted to each category of work. Counsel lists seven hours of work devoted to "research and brief drafting and writing" on "5/18/78 through 6/16/78," which does not adequately fulfill this requirement. Therefore, upon remand the administrative law judge should require a revised fee application.

Finally, claimant's counsel has submitted an application for fees for work performed in prosecuting this claim on appeal. Given the necessity for remand for recalculation of the average weekly wage and for reconsideration of whether the decedent suffered disability earlier in time, we cannot yet determine whether and to what extent claimant may have been sucessful in prosecuting this case. A fee award is not proper at this time. See Morgan v. Marine Corps Exchange, 10 BRBS 442 (1979). Claimant's counsel is granted leave to refile his fee request once the administrative law judge has reconsidered his decision pursuant to our order of remand.

Accordingly, the administrative law judge's average weekly wage calculation, determination of onset of disability, and attorney's fee award are vacated, and this case is remanded to the

administrative law judge for reconsideration consistent with our opinion herein.

SO ORDERED.

ISMENE M. KALARIS
Administrative Appeals Judge

SMITH, Chief Administrative Appeals Judge, concurring:

This is an occupational disease case of considerable importance to shipyard workers, shipyards and their insurance carriers, in that we are called upon to re-examine and decide "the time of injury" for purposes of computing average weekly wage under Section 10 of the Act. Arthur J. Dunn, like many other workers, was employed as a steamfitter and pipefitter for Todd Shipyards Corporation during World War II (1942-1944). During his employment with Todd, Mr. Dunn was exposed to

asbestos fibers. Mr. Dunn thereafter worked for three different wholesale plumbing supply companies until 1966 or 1967. He was later employed by a Catholic church where he performed odd jobs. Mr. Dunn's only period of exposure to asbestos was during his employment at Todd. Mr. Dunn became seriously ill in 1975, and died on January 27, 1976, after a period of hospitalization. An autopsy determined the cause of death as lung cancer, pulmonary asbestosis, and chronic obstructive pulmonary disease. Mr. Dunn's widow seeks death benefits for herself, as well as disability benefits for her husband prior to his death.

At the outset it must be recognized that the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq. (hereinafter, the Act), does not lend itself to easy

resolution of occupational disease cases. The Department of Labor has provided little if any any clarification by way of implementing regulations. Furthermore, since occupational disease cases are just now coming to the forefront there is little, if any, case law upon which to rely. Thus litigants in occupational disease cases arising under the Act find themselves sailing on uncharted seas.[1/] The Benefits Review Board and the Courts of Appeal will be called upon with increasing frequency to field the hot grounders of occupational disease cases, especially those involving asbestosis claims.

I concur fully in the results reached by my colleague in the lead opinion, however, I also reach the same

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1/ Smith and Birek, Sailing the Uncharted Seas of Asbestosis Litigation Under the Longshoremen's and Harbor Workers' Compensation Act, 2 WM. & MARY L. Rev. 177 (1988).

result with respect to defining "at the time of injury" by another route. After a most detailed discussion of various options advanced by the litigants and the many amici, my colleague finds that based on the weighing of policy considerations that the date of last exposure to a harmful stimuli is the "time of injury" for purposes of determining average weekly wage pursuant to Section 10 of the Act. This, of course, is necessary since benefits under the Act are based upon a workers' average weekly wage "at the time of injury."

Although one Court of Appeals has reminded us that it is not our prerogative to make policy, I cannot fault my colleague for balancing policy considerations in her opinion. Except for some legislative hsitory that gives a flicker of light to the perplexing legal issue presented herein, there have

been no policy announcements, legislative enactments, or clarifying regulations by either the Congress or the Department of Labor in occupational disease cases arising under the Act. Ryan-Walsh Stevedoring Co., Inc. v. Trainer, 601 F.2d 1306, 10 BRBS 852 (5th Cir. 1979), rev'g in part, remanding in part Trainer v. Ryan-Walsh Stevedoring Co., Inc., 8 BRBS 59, BRB No. 76-454 (1978). The pertinent legislative history dating back to 1926, as well as more recent legislative history, is set forth fully in the amicus brief filed by Bethlehem Steel Corporation (pp. 4-19) which I find to be compelling. It would serve no useful purpose, except to add more pages to an already lengthy decision, to set out in full in this opinion the part of Bethlehem's brief referred to herein.

By way of summary it is my view that aside from the policy

considerations referred to by my colleague, proper interpretation of the legislative history and the relationship of Section 10 to the entire statutory scheme of the Act also mandates the result reached by my colleague, namely that the meaning of "at the time of injury" in Section 10 of the Act is the date of last exposure to the harmful stimuli.

Accordingly, I would remand this case to the administrative law judge for reconsideration consistent with this opinion.

SAMUEL J. SMITH, Chief
Administrative Appeals Judge

MILLER, Administrative Appeals Judge, concurring in part and dissenting in part:

While I concur in the remand of this case to the administrative law judge, I must respectfully dissent from

my colleagues' adoption of the date of last exposure as the "time of injury" for determining average weekly wage in occupational disease cases. After a thorough consideration of all possible alternatives, it is my conclusion that the only definition of "time of injury" for purposes of Section 10 of the Act which gives proper consideration to the purposes of the Act is as follows: the date when a work-related occupational disease manifests itself through a loss of wage-earning capacity.[1/]

The term "injury" is found in many sections of the Act. Section 2(2) of

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1/ The schedule provisions of the Act, 33 U.S.C. §908(c)(1)-(20), presume that claimant has suffered a loss of wage-earning capacity. See Travelers Insurance Co. v. Cardillo, 225 F.2d 137 (2d Cir.), cert. denied, 350 U.S. 913 (1955). Accordingly, in occupational diseases which are covered by the schedule provisions of the Act, e.g., hearing loss, the "time of injury" for purposes of Section 10 of the Act is the date that there is a manifestation of a work-related occupational disease.

the Act statutorily defines "injury"; however, the Board is "not bound to follow a statutory definition where obvious incongruities in the statute would thereby be created, or where one of the major purposes of the legislation would be destroyed." See 1A Sands, Sutherland Statutory Construction §27.02 (1972). Section 2(2) would define injury in an occupational disease case to be "such occupational disease...as arises naturally out of such employment...." Thus, the date of injury for purposes of determining average weekly wage pursuant to Section 10 would be the date of occupational disease. As there is no specific date for an occupational disease, the statutory definition is not conclusive, and the Board "must then determine as best it can the meaning of the language ["time of injury"] in accordance with the legislative intent and common

understanding so as to prevent absurdities and to advance justice." Id. at §20.08.[2/]

This Board is faced with interpreting the phrase "time of injury" as it is used in Section 10 of the Act in cases where the work-related injury is an occupational disease. As my colleagues have noted, Congress intended that each section of the Act would implement a concept of workers' compensation. An inflexible definition

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2/ The Supreme Court has applied this principle of statutory construction to the Act. In Lawson v. Suwanee Fruit and Steamship Co., 336 U.S. 198 (1949), the Court found that the definition of disability found in Section 2(10) was not applicable to the term "disability" as it is used in Section 8(f). In Lawson, the term "disability" was construed in the manner which would best effectuate the congressional intent of preventing discrimination to handicapped workers. Since application of the definition found in Section 2(10) would have created obvious incongruities and destroyed one of the major purposes of Section 8(f), the Court found that the statutory definition did not control.

of "time of injury" throughout the Act would denigrate the purpose behind some of the provisions of the Act, since the purpose underlying individual sections of the Act may vary. Thus, it is of paramount importance that the Board discern the congressional intent underlying Section 10 and define "time of injury" so as to best effectuate the underlying purposes of Section 10 and the Act.

The purpose of the Act is to compensate claimants for a loss of wage-earning capacity which resulted from a work-related injury and/or occupational disease. Travelers Insurance Co. v. Norton, 24 F. Supp. 243 (D.Del. 1938), rev'd on other grounds, 105 F.2d 122 (3d Cir. 1939). Section 10 provides the framework for calculating claimant's award through establishing claimant's average weekly wage at the time of the injury, in order that claimant's loss of

wage-earning capacity may be measured. See Baltimore & Carolina S.S. Co. v. Norton, 40 F.2d 271 (E.D. Pa. 1929).

In traumatic injury cases, the work-related injury or physical harm and the loss of wage-earning capacity occur simultaneously. Thus, the "time of injury" in traumatic injury cases is the date that claimant has suffered a physical harm and a loss of wage-earning capacity. In occupational disease cases, it is difficult to ascertain when the physical harm occurs.3/ If physical harm is deemed to occur at the time of exposure, the time of harm and the time of loss of wage-earning capacity may be substantially unconnected in time. This will result in a disparity of treatment

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3/ As noted by my colleagues, the latency period for some occupational diseases, e.g., asbestosis, may be many years, during which time claimant may have suffered no loss of actual wages or wage-earning capacity.

between claimants who are disabled as a result of traumatic injuries and claimant's who are disabled as a result of an occupational disease. Such a result is contrary to the intent of the Act -- "an Act designed to provide equal justice to every longshoreman similarly situated." Jackson v. Lykes Bros. Steamship Co., 386 U.S. 731, 735 (1967).4/

The definition of "time of injury" for purposes of Section 10 which would best effectuate the underlying purposes of Section 10 and the Act would be to define "time of injury" in an occupational disease case so as to formulate a time of injury which coincides with loss of wage-earning capacity. Accordingly, average weekly wage should be calculated at the time

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4/ While the issue of Jackson was claimant's right to maintain an action for unseaworthiness, the principle applies equally to the instant case.

that an occupational disease manifests itself through a loss of wage-earning capacity.[5/] This definition assures that claimant's award is premised on claimant's average weekly wage at the time that he suffers a loss of wage-earning capacity and thus furthers the Act's purpose of compensating for loss of wage-earning capacity.[6/]

5/ This definition is harmonious with the Board's decision in Stark v. Bethlehem Steel Corp., 6 BRBS 600, BRB Nos. 76-187 and 76-204/A (1977), reaff'd on reconsideration, 10 BRBS 350, BRB No. 78-337 (1979). Accord, Ward v. General Dynamics Corp., 9 BRBS 569, BRB No. 78-394 (1978); Keeler v. General Dynamics, 7 BRBS 989, BRB No. 77-287 (1978).

6/ This purpose has been recognized in the line of cases interpreting Section 10(c) of the Act. See Palacios v. Campbell Industries, 12 BRBS 806, 633 F.2d 840 (9th Cir. 1980); National Steel & Shipbuilding Co. v. Bonner, 600 F.2d 1288 (9th Cir. 1979); Tri-State Terminals, Inc. v. Jesse, 10 BRBS 700, 596 F.2d 752 (7th Cir. 1979). Thus, in Jesse the Court recognized that "[i]t is manifest that the prime objective of Section 10(c) was to insure that compensation awards would be based on accurate assessments of the claimant's earnings capacity." 596 F.2d at 756.

Where the date of injury in occupational disease cases is defined as the date a work-related occupational disease manifests itself through a loss of wage-earning capacity, claimants with occupational diseases and claimants with traumatic injuries are treated equally. In both cases, claimants will have their loss of wages premised on a figure derived from the time that the actual loss of wage-earning capacity occurred. Workers who are exposed to asbestos at the same time may receive different awards if the latency period of the disease differs among them: however, they will receive equal treatment premised on their actual loss of wage-earning capacity, since their average weekly wage calculations will be reflective of their actual loss.

The underlying purpose of Section 10 is not to equalize the amount of awards for workers disabled by the same

injuries, but rather, to justly compensate claimants for their loss of wage-earning capacity and to treat equally situated claimants equally. Where one worker elected to work a large amount of overtime work, and another worker elected not to work overtime, the workers may be injured at the same time from the same traumatic incident and have different awards due to differences in their average weekly wage at the time of the injury. While the awards are "unequal" in amount, they are not inequitable. Rather, the difference between the claimants' average weekly wages serves to provide proper compensation to each claimant for his loss of earnings as the result of the work-related injury. Similarly, two workers injured as the result of exposure to asbestos may have awards which are unequal in amount; however, these awards will reflect the actual

wages earned by the workers and, thus, reflect their actual loss of wage-earning capacity.7/

7/ My colleagues contend that this test will result in unequal treatment to those claimants who have voluntarily retired at the time that the physical harm from the occupational disease is manifest. Where an employee has voluntarily withdrawn from the labor market, due to retirement or for other reasons, he will have no average weekly wage at the "time of injury." However, such employees are not entitled to a "windfall" where they have made a voluntary decision to curtail their earnings. See Jackson v. Potomac Temporaries, Inc., 12 BRBS 410, BRB No. 79-292 (1980); Conatser v. Pittsburgh Testing Laboratory, 9 BRBS 541, BRB No. 77-507 (1978). These employees were not intended to benefit from the Act, as the Act is intended to replace loss of wage-earning capacity, and retirees may have no loss of wage-earning capacity. My colleagues' test would effectively award such employees benefits for pain and suffering since the award would not replace a loss of wage-earning capacity. Such a result is not in accordance with the intent of the Act. It is far better to choose a rule which results in an adequate and equitable replacement of wage-earning capacity for those who are actually suffering such a loss than to give some benefits to those who have not suffered a loss of wage-earning capacity. In addition, this is not to say that a claimant could not introduce

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The Act is intended to be construed liberally, resolving all doubts, factual and otherwise, in claimant's favor. See Friend v. Britton, 220 F.2d 820 (D.C. Cir.), cert. denied, 350 U.S. 836 (1955). See also Vinson v. Einbinder, 307 F.2d 387 (D.C. Cir. 1962), cert. denied, 372 U.S. 934 (1963). The intent of the Act is to place the burden of possible error on the party best able to bear it. It has been consistently recognized that employer is the party best able to bear the burden of possible error. See, e.g., Young & Co. v. Shea, 397 F.2d 185 (5th Cir. 1968), cert. denied, 395 U.S. 920 (1969).

[cont'd]
proof of a return or an intent to return to the labor market, thereby establishing a loss of wage-earning capacity. Nor is this to imply that those claimants who have retired as a result of their disability could not show that the disability became manifest prior to retirement, and, accordingly, they may receive an award premised on that time of manifestation.

Thus, this definition of "time of injury" may result in employer paying compensation for wage-earning capacity developed after claimants have left employer's employment; however, if employers do not pay for such loss of developed wage-earning capacity, claimants will carry the burden of loss. The beneficent purpose of the Act requires that this burden not fall on claimants. Therefore, employer's liability should not be the primary concern in determining a claimants loss of average weekly wage due to a work-related injury.

The main focus of my colleagues' concern with this test is that

> [i]n cases where the disease has a long latency period, the date of manifestation frequently bears no relationship to the employment exposure which caused the disease, since the employee will often have left that employment prior to the date of manifestation. In such cases, employer would be

> paying compensation computed from a wage (perhaps a much higher one) other than that it actually paid to the employee. This places a tremendous burden on both employers and carriers, since it is impossible to predict accurately the amount of liability or to fix insurance premiums based on unknown future wage levels.

Majority opinion, slip op. at 20-21. My colleagues' concern is misplaced. The proper consideration before this Board is the interpretation of the term "time of injury" for determining average weekly wage in occupational disease cases arising under the Act. It is this Board's duty to discern congressional intent and to premise our interpretation of the phrase "time of injury" in accordance with such intent. The majority cites to no congressional intent which would indicate that the definition of "time of injury" should be premised on balancing benefits to claimants against duties and obligations

of the employer. In the absence of such congressional intent, my colleagues engage in policymaking. Such policymaking is outside the scope of our judicial mandate. See Kicklighter v. Ceres Terminal, Inc., 13 BRBS 109, 124, BRB No. 79-550 (1981).

Additionally, liability not evident to employer at the time of employment has been imposed on employer by other sections of the Act. In particular, the 1972 amendments to Section 9 of the Act, which retroactively provided death benefits to survivors of an employee who sustained a permanent total disability due to a work-related injury and thereafter died from another cause, was affirmed by the courts as being constitutional and otherwise in accordance with law. See Nacirema Operating Co. v. Lynn, 8 BRBS 464, 577 F.2d 852 (3d Cir. 1978), cert. denied, 439 U.S. 1069 (1979); Norfolk, Baltimore

& Carolina Lines, Inc. v. Director, OWCP, 4 BRBS 245, 539 F.2d 378 (4th Cir. 1976), cert. denied, 429 U.S. 1078 (1977); State Insurance Fund v. Pesce, 548 F.2d 1112 (2d Cir. 1977). See also 33 U.S.C. §914(m) (1970) (repealed 1972). The repeal of Section 14(m) has also been applied retroactively to awards which did not reach the statutory ceilings prior to the effective date of the 1972 amendments. See Argonaut Insurance Co. v. Director, OWCP, 13 BRBS 297, F.2d (1st Cir. 1981); Hastings v. Earth Satellite Corp., 628 F.2d 85 (D.C. Cir. 1980); Avondale Shipyards, Inc. v. Vinson, 12 BRBS 478, 623 F.2d 1117 (5th Cir. 1980). In none of these cases did the courts consider the interests of the employer to be of more importance than the interests of the claimants under this beneficent Act.

I must note my strong opposition to the definition of date of injury being

date of last exposure as chosen by my colleagues.[8/] The rule established by my colleagues relies on the Section 44 Special Fund and the Section 10(h) adjustments to compensate claimants for the actual loss suffered as the result of the work-related occupational disease. There is nothing to indicate that Congress ever intended that the Special Fund take on such liability, and

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8/ My colleagues, after an exhaustive, if a somewhat skewed consideration of alternate definitions for "time of injury", conclude that they have no option but to find that Congress intended that the date of last exposure should govern the date for determining average weekly wage under Section 10 and that any other interpretation of the phrase would have to be congressionally mandated. As the first 25 pages of my colleagues' decision indicate, my colleagues were faced with several other alternatives to choosing a definition for "time of injury." In spite of the options available, my colleagues choose the alternative which, in my view, least furthers the congressional intent of basing claimant's award on the actual loss of wages resulting from the injury. Such a conclusion is not mandated by either congressional intent or the existing case law.

we are not free to legislate such liability.

More importantly, my colleagues reliance on Section 10(h) adjustments as the means of replenishing a claimant's actual loss of wages completely fails to consider those claimants who are permanently <u>partially</u> disabled from an occupational disease. The Section 10(h) adjustments will not affect these claimants, as the adjustments only apply to beneficiaries of employees who have died or claimants who are permanently totally disabled. Thus, claimants who are able to continue to do some work will be compensated only for the amount of wages earned perhaps 20 or 30 years previously when they were last exposed to the deleterious substance. This could result in a claimant who is 50 percent permanently partially disabled only receiving compensation based on a fraction of the wages that the employee

was actually earning at the time that he suffered a loss of wage-earning capacity.

The inequities inherent in my colleagues' approach are readily apparent when the following hypothetical situation is considered. Assume that a shipbuilder who earned $50 per week in 1945, when he was last exposed to asbestosis, continued working as a shipbuilder until late 1980, when he began to experience severe breathing difficulties. Assume further that in 1980, he was earning an average shipbuilder's wage of $400 per week. In early 1981, this hypothetical claimant was unable to continue working as a shipbuilder because of his breathing impairment and became a janitor, earning approximately $120 per week, the minimum wage for a forty hour week.

My colleagues would find that this hypothetical claimant's average weekly

wage at the time of injury (date of last exposure) was $50. His post-injury wage-earning capacity of $120 per week must then be adjusted to the 1945 level, see Devillier v. National Steel & Shipbuilding Co., 10 BRBS 649, BRB No. 78-278 (1979), and would be approximately $40. Thus, this hypothetical claimant would suffer a $10 loss of wage-earning capacity. Moreover, because this hypothetical claimant is still able to work, and hence, only suffers a partial disability,[9/] he is not entitled to any Section 10(h) adjustments. This hypothetical situation reveals the resulting inadequacies of my colleagues' date of last exposure test. Such a

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9/ The hypothetical claimant's actual loss of wage-earning capacity would have been $280 ($400 average weekly wage at the time that the work-related occupational disease manifested itself through a loss of wage-earning capacity minus the actual post-injury wages of $120 per week).

result is clearly contrary to any congressional mandate.

My colleagues conclude by stating that the rule that they have chosen is "not that inequitable" (emphasis added), recognizing that their action is inequitable to claimants, at least to some degree. In failing to consider those claimants who will be permanently partially disabled as a result of the occupational disease and in awarding benefits limited by wages earned many years prior to the actual date of disability, my colleagues distort the very intent of this Act, which is to replace the acutal loss of wage-earning capacity suffered by employees as the result of work-related injuries or occupational diseases. Accordingly, while I concur in remanding this case to the administrative law judge, I must strongly dissent from their determination that the date of last

exposure is the "time of injury" for purposes of Section 10 of the Act: the proper test for the "time of injury" is the date that an occupational disease manifests itself through a loss of wage-earning capacity.

JULIUS MILLER
Administrative Appeals Judge

Dated this 12th day
of June 1981

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APPENDIX G

STATUTES INVOLVED

33 U.S.C. § 902(2):

> The term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment. [Act of Mar. 4, 1927, ch. 509, § 2, 44 Stat. 1424]

33 U.S.C. § 902(3):

> The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net. [Act of Oct. 27, 1972, P.L. 92-596, § 2(a), 86 Stat. 1251 (amending 33 U.S.C. § 902(3) (1927))]

33 U.S.C. § 902(3) (originally enacted):

> The term 'employee' does not include a master or member of a crew of any vessel, nor any person

engaged by the master to load or unload or repair any small vessel under eighteen tons net. [Act of Mar. 4, 1927, ch. 509, § 2, 44 Stat. 1424 (amended 1972)]

33 U.S.C. § 902(4):

The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). [Act of Oct. 27, 1972, P.L. 92-576, § 2(b), 86 Stat. 1251 (amending 33 U.S.C. § 902(4) (1927))]

33 U.S.C. § 902(4) (originally enacted):

The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock). [Act of Mar. 4, 1927, ch. 509, § 2, 44 Stat. 1424 (amended 1972))]

33 U.S.C. § 902(10):

'Disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment. [Act of Mar. 4, 1927, ch. 509, § 2, 44 Stat. 1424]

33 U.S.C. § 902(13):

> 'Wages' means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer. [Act of Mar. 4, 1927, ch. 509, § 2, 44 Stat. 1424]

33 U.S.C. § 903(a):

> Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employee in loading, unloading, repairing, or building a vessel). . . . [Act of Oct. 27, 1972, P.L. 92-567, § 2(c), 86 Stat. 1251 (amending 33 U.S.C. § 903(a) (1927))]

33 U.S.C. § 903(a) (originally enacted):

> Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through

workmen's compensation proceedigns may not validly be provided by State law. . . . [Act of Mar. 4, 1927, ch. 509, § 3, 44 Stat. 1426 (amended 1972)]

33 U.S.C. § 910(a)-(d):

Except as otherwise provided in this Act, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:

(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings, if a six-day worker, shall consist of three hundred times the average daily wage or salary, and, if a five-day worker, two hundred and sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of

such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

(c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earnings capacity of the injured employee.

(d) The average weekly wages of any employee shall be one fifty-second part of his average annual earnings. . . . [Act of Mar. 4, 1927, ch. 509, § 10, 44 Stat. 1431; Act of June 24, 1948, ch. 623, § 4, 62 Stat. 603]

33 U.S.C. § 910(h):

(1) Not later than ninety days after the date of enactment of this subsection, the compensation to which an employee or his survivor is entitled due to total permanent disability or death which commenced

or occurred prior to enactment of this subsection shall be adjusted. The amount of such adjustment shall be determined in accordance with regulations of the Secretary by designating as the employee's average weekly wage the applicable national average weekly wage determined under section 6(b) and (A) computing the compensation to which such employee or survivor would be entitled if the disabling injury or death had occurred on the day following such enactment date and (B) subtracting therefrom the compensation to which such employee or survivor was entitled on such enactment date; except that no such employee or survivor shall receive total compensation amounting to less than that to which he was entitled on such enactment date. Notwithstanding the foregoing sentence, where such an employee or his survivor was awarded compensation as the result of death or permanent total disability at less than the maximum rate that was provided in this Act at the time of the injury which resulted in the death or disability, then his average weekly wage shall be determined by increasing his average weekly wage at the time of such injury by the percentage which the applicable national average weekly wage has increased between the year in which the injury occurred and the first day of the first month following the enactment of this section. Where such injury occurred prior to 1947, the Secretary shall determine, on the basis of such economic data as he deems relevant, the amount by which

the employee's average weekly wage shall be increased for the pre-1947 period.

(2) Fifty per centum of any additional compensation or death benefit paid as a result of the adjustment required by paragraphs (1) and (3) of this subsection shall be paid out of the special fund established under section 44 of this Act, and 50 per centum shall be paid from appropriations.

(3) For the purpose of subsections (f) and (g) an injury which resulted in permanent total disability or death which occurred prior to the date of enactment of this subsection shall be considered to have occurred on the day following such enactment date. [Act of Oct. 27, 1972, P.L. 92-576, § 11, 86 Stat. 1258]

33 U.S.C. § 912(a):

Notice of an injury or death in respect of which compensation is payable under this Act shall be given within thirty days after the date of such injury or death, or thirty days after the employee or beneficiary is aware or in the exercise of reasonable diligence should have been aware of a relationship between the injury or death and the employment. Such notice shall be given (1) to the deputy commissioner in the compensation district in which the injury occurred, and (2) to the employer. [Act of Oct. 27, 1972, P.L. 92-576, § 12(a), 86 Stat. 1259

(amending 33 U.S.C. § 912(a) (1927))]

33 U.S.C. § 912(a) (originally enacted):

> Notice of an injury or death in respect of which compensation is payable under this Act shall be given within thirty days after the date of such injury or death (1) to the deputy commissioner in the compensation district in which such injury occurred and (2) to the employer. [Act of Mar. 4, 1927, ch. 509, § 12, 44 Stat. 1431 (amended 1972)]

33 U.S.C. § 913(a):

> Except as otherwise provided in this section, the right to compensation for disability or death under this Act shall be barred unless a claim therefore is filed within one year after the injury or death. If payment of compensation has been made without an award on account of such injury or death, a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or death occurred. The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment. [Act of Oct. 27, 1972, P.L. 92-576, § 12(b), 86 Stat. 1259 (amending 33 U.S.C. § 913(a))]

33 U.S.C. § 913(a) (originally enacted):

> The right to compensation for disability under this Act shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death, except that if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or such death occurred. [Act of Mar. 4, 1927, ch. 509, § 13, 44 Stat. 1432 (amended 1972)]

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